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THE
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

**FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1889.**

COMPILED AND ANNOTATED

BY A. C. FREEMAN

**COUNSELLOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENTS,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.**

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AMERICAN DECISIONS.
VOL LXXX.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

TODD v. OLD COLONY AND FALL RIVER RAILROAD CO.

[8 ALLEN, 18.]

AWARD AGAINST ONE RAILROAD COMPANY IS NO BAR TO ACTION AGAINST ANOTHER COMPANY, for an injury caused to a passenger through the negligence of both, where the award is returned into court, in compliance with the terms of the submission, and it is still pending there without judgment having been entered thereon, although the costs of the arbitration were paid by the company against whom the award was made.

RAILROAD COMPANY IS LIABLE TO PASSENGER, CARRIED FREE OF CHARGE, for injuries caused by its omission to use due and reasonable care.

PASSENGER IN RAILROAD CAR, WHO RIDES WITH HIS ELBOW OR ARM OUT OF WINDOW, by reason of which he sustains an injury, is guilty of a want of due care, which will prevent him from maintaining an action for damages.

TORT by Robert M. Todd to recover damages for an injury sustained by him while traveling as a free passenger upon the defendants' road, by consent of the superintendent and a conductor. The injury was caused by the door of a freight-car, which had been left standing upon the track of the Boston and Worcester Railroad Corporation, running parallel to the defendants' road, becoming unfastened, swinging around, and striking the plaintiff's arm. The plaintiff had claimed damages against the Boston and Worcester Railroad Corporation, previous to instituting this action, and the matter was referred to arbitrators, who awarded the plaintiff one thousand dollars and costs. The award was returned into the superior court of Suffolk county, in compliance with the terms of its submission, and was still pending there, without judgment having been

entered thereon, although the costs of the arbitration were paid by the Boston and Worcester Railroad Company. The defendants asked the court to charge that the award operated as a bar to the plaintiff's claims upon the defendants; that if the plaintiff's arm or elbow was out of the window of the car in which he was seated when it was struck by the car door, this, of itself, was such a want of due care on the part of the plaintiff as would prevent his recovery; and that if the plaintiff was riding as a free passenger at the time of his injury, the defendants were not bound to exercise the same degree of care and diligence towards him as towards a passenger who paid his fare; but the jury were instructed that the award was no bar to this action; that, although the plaintiff was riding without paying fare, the defendants, under the circumstances, were bound to exercise the same degree of care and diligence towards him as if he had paid his fare; and the court left it for the jury to determine if they should find that the plaintiff's arm or elbow was outside of the car window when it was struck, whether the plaintiff was using the care incumbent on him as a passenger. The plaintiff had a verdict for two thousand dollars, and the defendants alleged exceptions.

J. J. Clarke, for the plaintiff.

H. C. Hutchins, for the defendants.

By Court, BIGELOW, C. J. 1. The award offered by the defendants constitutes no bar to the present action. It settles nothing conclusively between the parties. It is still open to revision by the court to which it was returned, and may be set aside or adjudged void for any good cause. It can have no greater effect than a verdict of a jury. It operates neither as a satisfaction nor as a judgment. Assuming, without deciding, that a judgment for a personal injury against one of two joint tort-feasors would be a bar to an action against the other, there is no good reason for the position that the pendency of an action against one should operate as a bar to the maintenance by the party injured of a separate action against the other. The rule is well settled that co-trespassers are jointly and severally liable, and that separate actions may be maintained against them for their wrongful acts. Until a judgment against one has been obtained, it is uncertain whether the party injured will be able to maintain more than one action. Clearly, it is no defense to show that another person

committed the alleged wrongful acts in company with the defendant. It is difficult, therefore, to see how his liability is affected by the fact that his co-trespasser is sued for the same act in another action. The *dictum* of Lord Ellenborough in *Boyce v. Douglas*, 1 Camp. 60, cited in 1 Ch. Pl., 6th Am. ed., 101, is not supported by the authorities, and is denied to be a correct statement of the law in *Henry v. Goldney*, 15 Mee. & W. 498; see also *Broome v. Wooton*, Yelv., Am. ed., 67, note; *Livingston v. Bishop*, 1 Johns. 290 [3 Am. Dec. 330]; *Campbell v. Phelps*, 1 Pick. 62 [11 Am. Dec. 139]; *Hyde v. Noble*, 13 N. H. 494 [38 Am. Dec. 508]. Nor can it make any difference as to the effect of the award that the costs of the reference were paid by the Boston and Worcester Railroad Corporation. Such payment cannot be regarded as a part performance of the award. It was only a preliminary step, by which the corporation obtained possession of it from the arbitrators for the purpose of returning it into court. The validity of the award and the rights of the plaintiff under it were wholly unaffected by this act of the corporation; *a fortiori* it can have no effect to bar the plaintiff from maintaining this action.

2. The instruction which the defendants asked concerning the degree of care and diligence which they were bound to exercise towards the plaintiff was rightly refused. If it be true that in certain cases a distinction is to be made as to the relative duty of carriers of passengers towards those who pay for their transportation and those who are carried gratuitously, it does not appear that the facts proved at the trial of this case rendered it material to call the attention of the jury to it. The defendants, having undertaken to transport the plaintiff in their cars, were bound to the use of due and reasonable care in performing a duty which they had voluntarily assumed; and if, by omitting to take such precautions as were necessary and proper to prevent a person exercising due care from receiving an injury, the plaintiff was injured, he is entitled to recover compensation therefor: *Philadelphia & Reading R. R. v. Derby*, 14 How. 483; *Steamboat New World v. King*, 16 Id. 469; Redfield on Railways, 329.

3. The only error in the instructions of the court related to that part of the case which involved an inquiry into the position of the plaintiff's arm at the time of the accident. If he was then riding in the car with his elbow or arm projecting out of the window, by reason of which he sustained an injury, he was guilty of a want of due care, which would prevent him

from maintaining his action. Looking at the mode in which railroads are constructed, with posts and barriers which are placed very near to the track on which the cars are to pass, the rapid rate at which trains move, the manner in which cars are made, with seats to accommodate passengers so as to avoid any exposure of the body or limbs to outward objects in passing, we can see no ground on which it can be contended that a person in traveling on a railroad is exercising reasonable care in placing his arm in such a position that it protrudes from a window, and may come in contact with external obstructions. Certainly, if it is a want of due care to attempt to leave a car when the train is in motion, although going at a slow rate of speed, as has been heretofore determined by this court, it is no less a want of proper care to ride in a car with an arm or leg exposed to collision against passing trains or the necessary obstructions on the sides of the track. Nor was it the province of the jury to determine, as a matter of fact, whether the plaintiff used due and reasonable care, if it was proved that his arm, or a portion of it, was outside of the window at the time of the accident. If there was no dispute or controversy about this fact, and the position of his arm was the cause of or contributed to the accident, the plaintiff failed to prove an essential element to the maintenance of his action. In such a state of the evidence, it was the duty of the court to decide on its legal effect, and to say to the jury that the plaintiff had failed to make out his case: *Lucas v. New Bedford and Taunton Railroad*, 6 Gray, 64 [66 Am. Dec. 406]; *Gavett v. Manchester and Lawrence Railroad*, 16 Id. 501 [77 Am. Dec. 422]; *Gahagan v. Boston and Lowell Railroad*, 1 Allen, 187 [79 Am. Dec. 724]; *Cotton v. Wood*, 8 Com. B., N. S., 568. We are therefore of opinion that the defendants were entitled to a more explicit instruction in answer to their second prayer than was given by the court, and that on this ground the verdict rendered in favor of the plaintiff must be set aside, and a new trial granted.

JUDGMENT AGAINST ONE JOINT TORT-FEASOR, WITHOUT SATISFACTION, DOES NOT BAR ACTION AGAINST ANOTHER: *Elliott v. Hayden*, 104 Mass. 182, referring to the principal case; and see also note to *Kirkwood v. Miller*, 73 Am. Dec. 145, 146.

CARRIER OF PASSENGERS IS LIABLE FOR INJURIES TO FREE PASSENGER THROUGH NEGLIGENCE: *Gillencroft v. Madison etc. R. R. Co.*, 61 Am. Dec. 101; *Nolton v. Western R. R.*, 69 Id. 623; *Washburn v. Nashville etc. R. R.*, 75 Id. 784.

NEGLECT, WHETHER QUESTION OF LAW OR FACT: See *Herring v. Wilmington etc. R. R.*, 51 Am. Dec. 395; *Linfield v. Old Colony R. R.*, 57 Id. 124; *Railroad Co. v. Skinner*, Id. 654; *Trow v. Vermont Central R. R.*, 58 Id. 191; *Zemp v. Wilmington etc. R. R.*, 64 Id. 763; *Galena etc. R. R. v. Yarmouth*, 65 Id. 682; *Mad River etc. R. R. v. Barber*, 67 Id. 312; *Norris v. Litchfield*, 69 Id. 546; *Gerke v. California Steam Nav. Co.*, 70 Id. 650; *Gavett v. Manchester etc. R. R.*, 77 Id. 422. In an action for injuries through negligence, if the whole evidence on which the plaintiff's case rests shows that he was careless, the court may rightfully instruct the jury, as a matter of law, that the action cannot be maintained: *Wright v. Malden etc. R. R.*, 4 Allen, 290; *Todd v. Old Colony etc. R. R.*, 7 Id. 208; *Warren v. Fitchburg R. R.*, 8 Id. 230; *Meesel v. Lynn etc. R. R.*, Id. 235; *Snow v. Housatonic R. R.*, Id. 448; *Burns v. Boston etc. R. R.*, 101 Mass. 53; *Wills v. Lynn etc. R. R.*, 129 Id. 352; *Detroit etc. R. R. v. Van Steinburg*, 17 Mich. 120; and see *Illinois Central R. R. v. Green*, 81 Ill. 25, all citing the principal case, but see it distinguished in *Barden v. Boston etc. R. R.*, 121 Id. 428. Thus a passenger who rides with his arm out of the window of a railroad car, whereby he is injured, cannot recover damages from the railroad company: *Indianapolis etc. R. R. v. Rutherford*, 29 Ind. 87; *Meesel v. Lynn etc. R. R.*, *supra*; *Snow v. Housatonic R. R.*, Id. 448, all citing the principal case, which is disapproved, however, on this point, in *Spencer v. Milwaukee etc. R. R.*, 17 Wis. 495.

BROWN v. NEALE.

[3 ALLEN, 74.]

WRIT OF ATTACHMENT CANNOT BE RIGHTFULLY ALTERED, after a service thereof has been made, by the insertion therein of a direction to summon a certain person as trustee; and there can be no rightful service of the writ after such alteration.

JUDGMENT CHARGING MORTGAGEE OF CHATTELS AS TRUSTEE, ON HIS DEFAULT, ceases to have any legal effect, where the property is seized and sold on execution, and the proceeds of the sale are applied towards satisfaction thereof.

TORT by James Brown, as the mortgagee of certain chattels, against the defendant, a deputy sheriff, for their conversion. The defendant attached the property on a writ in favor of one Ferguson against one Locke. The plaintiff subsequently demanded of Locke the amount due upon his note, secured by the mortgage, and thereupon the writ against Locke was altered by the insertion of a direction to summon the plaintiff, as his trustee. The service was then completed, Locke and Brown were defaulted, and an execution was levied upon the property originally attached. Judgment was rendered for the plaintiff, the damages being fixed by agreement at one hundred dollars, provided the action could be maintained. The defendant appealed.

A. Jackson, for the plaintiff.

J. C. Park, for the defendant.

By Court, METCALF, J. It is the opinion of the court that Ferguson's writ, in his action against Locke, was not altered and served rightfully; that the plaintiff is not by his default in that action estopped from commencing this suit; and that he is therefore to have judgment for the sum agreed on by the parties.

Had Ferguson's writ been originally a trustee process, he would have been authorized, by the revised statutes, chapter 109, section 9, to insert therein the names of additional persons as trustees, after an attachment of Locke's property and before further service on him by copy. But we know of no other case in which a new party can be added to a writ after an attachment thereon has been made, unless leave for so doing has been first obtained from the court subsequently to the return and entry of the writ.

It has been argued for the defendant, that the alteration of the writ was rightfully made without leave of court, under the statutes of 1844, chapter 148, section 2, which authorized the attachment of mortgaged goods in the possession of the mortgagor, and the summoning of the mortgagee in the same action, as his trustee. But we cannot perceive any more reason for giving such a construction to that statute than to the statutes which first authorized the summoning of corporations, executors and administrators, as trustees: Stats. 1832, c. 164; R. S., c. 109, sec. 62.

If Ferguson had discharged his attachment and surceased his suit against Locke, he might afterwards have made a trustee writ and a new attachment. And it would have been no objection to the validity of such attachment that the second writ was made by altering the first, instead of making it on a new blank: *Gile v. Devens*, 11 Cush. 59.

The writ not being rightfully altered, there could be no rightful service of it after the alteration. If the court had deemed the alteration rightful, it would have been necessary to decide whether the service, which was afterwards made conformed to the statute requisitions. But that question is now immaterial.

There is no estoppel on the plaintiff in this case. Nor would there have been even if the alteration and service of Ferguson's writ had been rightfully made. A judgment charging

an alleged trustee on his default, in the original action, has never been conclusively binding on him. He might always show, on *scire facias*, that he was not chargeable. Besides, by the proceedings on the execution against Locke, the judgment charging the plaintiff ceased to have any legal effect. The property, for which alone he was sought to be charged as trustee, was seized and sold on that execution, and the proceeds of the sale were applied towards satisfaction thereof. Ferguson, therefore, could have no claim on the plaintiff by reason of the judgment which charged him as trustee. No demand of payment nor of a delivery of the goods was made on the plaintiff by the officer holding the execution; so that if the mortgaged property had not been sold, or if only a part of it had been sold, a writ of *scire facias* could not have been maintained against the plaintiff: R. S., c. 109, secs. 29, 38. Again: the defendant might have put to the plaintiff the same interrogatories, in this action, which might have been put to him on a trustee process regularly made and served, and might thus have successfully defended the action, if the plaintiff's answers had failed to show the validity of his mortgage.

Judgment for the plaintiff for one hundred dollars.

WRIT OF ATTACHMENT CANNOT BE ALTERED AFTER SERVICE without leave of court: *Bray v. Libby*, 71 Me. 279; *Simeon v. Cramm*, 121 Mass. 493, both citing the principal case.

JUDGMENT AGAINST GARNISHEE, EFFECT OF: See *Sessions v. Stevens*, 46 Am. Dec. 339, and note discussing the subject; *Adams v. Filer*, 73 Id. 410, and note collecting other cases. The *dictum* in the principal case to the effect that the default of a trustee was not conclusively binding upon him, and that he could always show that he was not chargeable, on *scire facias*, was disapproved in *Flanagan v. Cutler*, 121 Mass. 98.

BOWMAN v. FLOYD.

[8 ALLEN, 76.]

INJUNCTION WILL NOT BE GRANTED TO RESTRAIN USE OF TRADE-MARK, which consists in part of the name of a former partner of some of the defendants, and which was adopted and used by the partnership, without objection, in the life-time of such partner, and used by the defendants since his death. The right to the use of such trade-mark is secured to the defendants by the Massachusetts statutes.

INJUNCTION WILL BE GRANTED, WITHOUT REGARD TO LAPSE OF TIME, TO RESTRAIN CONTINUED USE OF ANOTHER'S NAME, in the designation, in whole or in part, of an existing partnership, without having obtained the written consent of the person if he be living, or of his legal representa-

tives if he be dead, as required by the Massachusetts general statutes, chapter 56, sections 1-4.

RESCRIPT WILL NOT BE CONSTRUED AS WRITTEN CONSENT TO CONTINUED USE OF ANOTHER'S NAME, when it is given merely in settlement of the claims of executors of a deceased partner against surviving partners, but in which the latter are mentioned by the partnership name, under which they continued to carry on business.

BILL in equity, filed by the executors of John G. Loring, to restrain the use of his name by the defendants, who carried on business under the name of John G. Loring & Co. The facts are stated in the opinion.

S. G. Nash, for the plaintiffs.

G. E. Betton, for the defendants.

By Court, **MERRICK, J.** The use of trade-marks, and the right to use the name of a third person not a partner, as a designation in whole or in part of a partnership, are both now regulated by the specific provisions of the statute relative to those subjects. It secures the right to the exclusive use of trade-marks, of whatever they may consist—whether of names, letters, or figures, intended by manufacturers or vendors to indicate that the articles to which they are in any way attached or affixed are of some peculiar kind, quality, character, or manufacture—to those by whom they have for that purpose been devised or adopted. But no person carrying on business in this state is allowed to assume or to continue to use in such business the name of any other person, either alone or in connection with his own or any other name or designation, without the written consent of such person or of his legal representatives: Gen. Stats., c. 56, secs. 1-4.

The answers to the bill allege that, in the life-time of the plaintiffs' intestate, and while two of the defendants, Floyd and Beal, were in partnership with him, the name of "John G. Loring and Company," was adopted as their trade-mark for all articles manufactured by them; that they have ever since constantly used and availed themselves of it for that purpose, alike during the life-time of said Loring, and since his decease, and since the formation of the partnership now subsisting between them and the other defendants, Farrar and Kendall. And the cause having come on to be heard upon the bill and answers, all these allegations are to be taken and considered as true. Nor has the plaintiff denied, or suggested that he would be warranted in denying, that these facts are

justly and truly stated. And as it thus appears that the name of "John G. Loring and Company" has been, and is, the trade-mark of the defendants, it is manifest that their right to the sole and exclusive use of it as such is secured to them by the statute, and that they cannot legally be enjoined or restrained from using it in that way, and for that purpose at their pleasure.

But it is otherwise in respect to the use of the name of a deceased partner as a part of the name or designation of a new partnership in the business or property of which neither the deceased nor those entitled to his estate have any interest. The use of the partnership name has sometimes been said to be a right belonging to the surviving partner, which will be protected against a similar use by other persons. Thus in the case of *Lewis v. Langdon*, 7 Sim. 421, where the surviving partner, having formed a new connection with other persons, continued to carry on his former peculiar kind of business, designating the new firm as "Successors to Brookman & Langdon," the name of the first copartnership, the executor of the deceased partner was enjoined from making use of it for any similar purpose. But it does not appear to have been ever held that a partnership name is of itself property, which constitutes a part of the assets either of the deceased or of the surviving partner. It is very clear that the surviving partner is not bound to continue the partnership business any further or longer than is necessary to bring it to a close, and to distribute the remaining property, after discharging outstanding obligations, among those to whom it belongs. And being under no such obligation, it is equally clear that upon his discontinuance of the business, he cannot be held accountable for any supposed value of the partnership name. When two or more persons agree to unite their labor and capital in the accomplishment of a particular enterprise, or in the conduct and pursuit of a certain branch of trade or manufacture for their mutual benefit, and to transact their business under a designated name of partnership, it is in fact a stipulation merely for their individual advantage in that connection; and as upon the decease of any one of them a dissolution of the partnership is a necessary consequence, its name can no longer have the same signification that it had before. It may, if there be no legal impediment in the way, be adopted by a new firm, and its use will afterwards, as against strangers, or other persons having no peculiar claim, be protected, as it was

in the case of *Lewis v. Langdon*, 7 Sim. 421. But it is certainly a use which may be regulated by the legislature in the enactment of statutes for the common welfare; and therefore the objection of the respondents that after the decease of John G. Loring, and before the enactment of any statute upon the subject, the name of the former partnership had been taken, assumed, and used by the succeeding partners as their own, and thereupon became their property, or was secured to them as a vested right, cannot avail them. For after the enactment of the statute, the continued use of the assumed name was subject to the regulations it prescribed. And by its provisions, as has already been shown, no person doing business in this commonwealth is authorized either to assume or to continue to use the name of another person in the designation, in whole or in part, of an existing partnership, whether the person be living or dead, without his consent in the one case, or that of his legal representatives in the other.

The respondents do not suggest that they ever obtained the written consent of Loring in his life-time, or of his legal representatives since his decease, to the use of his name, either in whole or in part, as the designation of the partnership under which they are now doing business, unless the receipt dated February 13, 1854, given to Floyd and Beal by his executors, ought to be construed as having that effect. But in executing and delivering that receipt, it is obvious that they had no such intent or purpose. It is an acknowledgment of the receipt by them of a certain sum of money in full satisfaction of that portion of the personal property of the copartnership mentioned in it, to which, as the legal representatives of Loring, they were entitled. It was a mere settlement of the claims of the executors of the deceased upon the surviving partners; and that purpose is expressed in the instrument itself. There is nothing in any of the expressions contained in it having any tendency to show that the executors intended to give, or that the surviving partners expected to obtain, thereby the written consent to the use of the name of the deceased as the name or designation of any other partnership.

As the statute forbids, not only the assumption, but the continued use, of the name of another person without consent first duly obtained, this controls the objection of the respondents, that they had before the institution of this suit so long uninterruptedly enjoyed the privilege of using the name of the deceased partner, that the right to interpose an effectual

objection by his legal representatives to the continuance of such use is barred by the statute of limitations. As the respondents are prohibited from continuing such use without the written consent of the legal representatives of Loring, the latter must necessarily have the right at any time at their pleasure to avail themselves of the remedy given them by the statute to cause the use to be restrained by injunction. And the remedy being given to the legal representatives of the deceased, his executors or administrators are the proper parties to resort to and enforce it.

TRADE-MARK, WHAT CONSTITUTES, AND INFRINGEMENT OF: See exhaustive note to *Partridge v. Menck*, 47 Am. Dec. 284.

THE PRINCIPAL CASE IS CITED IN *Solder v. Johnson*, 111 Mass. 244, to the point that a trade-mark used by a partnership does not, upon the dissolution of the firm by the death of a partner who had previously used it, revert to and become the property of his estate; in *Hallett v. Cumston*, 110 Id. 31, to the point that when a person has no interest in a business he cannot maintain a bill to restrain another from using a trade-mark used in that business; and in *Lodge v. Weld*, 139 Id. 504, to the point that bills to restrain the use of one's name by another, in business, without consent, as required by the statutes of Massachusetts, have always been brought in the name of the person himself whose name is used, or of his executor or administrator.

THAYER v. BACON.

[3 ALLEN, 163.]

AWARD ESTABLISHING BOUNDARY LINE BETWEEN ESTATES OF ADJACENT PROPRIETORS, under a submission for that purpose, is conclusive upon the parties.

AGREEMENT DOES NOT CONSTITUTE SUBMISSION TO ARBITRATION, so as to make lines run thereunder conclusive upon the parties, where it is executed by proprietors of adjoining lands, reciting that they were desirous of having their respective lines run so that each might know his boundary, and agreeing to employ a surveyor to run the lines, and put up stakes, or marks, to designate each lot, and to pay the expense proportionally.

ESTOPPEL IS NOT CREATED AS AGAINST OWNER OF LAND, from claiming that lines run by a surveyor, at the expense of himself and an adjoining proprietor, are not the true lines, where such adjoining proprietor adopts the lines and builds in conformity with them, unless the former had knowledge, or reason to believe, that the latter was making expenditures upon the faith of a supposed agreement to treat the lines thus run as the true lines.

WRIT of entry. Several land-owners, including the parties to the action, executed the following agreement: "We, the undersigned, owners of wharves and flats east of Harrison

avenue, are desirous of having our respective lines run so as each of us may know our boundary. We severally agree to employ Mr. Alexander Wadsworth to run said lines, and put up stakes, or marks, to designate each lot; and we further agree to pay our proportion of the expense of the same." The lines were run and the stakes put up, in accordance with this agreement. Subsequently, the tenant built his wharf in conformity with the lines. The demandant had a verdict, and the tenant alleged exceptions. Further facts are stated in the opinion.

G. O. Shattuck, for the demandant.

G. E. Betton, for the tenant.

By Court, HOAR, J. It is well settled by a series of decisions in this commonwealth that an award of arbitrators under a submission by which they are authorized to fix and establish the boundary line between the estates of adjacent proprietors is conclusive upon the parties, and that they are estopped to dispute the boundary thus ascertained and settled: *Searle v. Abbe*, 13 Gray, 409, and cases there cited. And if the instrument upon which the defendant relies is to be construed as an agreement to submit to arbitration the line between him and the plaintiff, the ruling of the court at the trial was wrong, and a new trial must be granted. But we cannot so construe it. The signers of the paper say that they are desirous of having their respective lines run so that each of them may know their boundary; and they severally agree to employ Mr. Wadsworth to run said lines and put up stakes or marks to designate each lot, and agree to pay their proportion of the expense. We seek in vain for the usual and apt words to constitute a submission to arbitration. It does not appear that there was any controversy between the owners, anything requiring a notice or hearing, or decision of conflicting claims. So far as the paper shows, the service expected of Mr. Wadsworth was simply ministerial. There is no agreement to adopt and abide by whatever lines he may determine. Such an agreement, indeed, would not be necessary, but would be implied by law from an explicit agreement to submit to arbitration; but where no such stipulation is clearly made, it does not seem to us to result from the employment of a surveyor to run lines. A contract which should substitute for the true line between estates that which might be run, however mistakenly, by a surveyor should indicate such an intention of

the parties making it in clear and unambiguous terms. The most that can be said of the paper introduced by the defendant is, that it is not inconsistent with such an intention; but it does not expressly prove it.

The only other ground of exception upon which the defendant has relied at the argument is the refusal of the judge who presided at the trial to give the instructions prayed for in regard to an alleged estoppel *in pais*, and to the instructions which were given to the jury upon that point. The instruction asked was this: "That if the jury believe that the tenant, acting in good faith, relying upon said agreement to run the lines to designate their lots, built his wharf upon or within the lines so ascertained, and released any right he had to lines farther south, which he would not have done but for said agreement, then the demandant is estopped by said agreement to claim any land covered by said lines so ascertained as the tenant's flats." It is very clear that this instruction would not have been warranted by law. An estoppel *in pais* must arise from some act of the party against whom the estoppel is claimed. If the demandant, with a knowledge or reason to believe that the tenant supposed the lines run by the surveyor were the true lines, stood by and allowed the tenant, without notice or objection, to make expensive outlays upon the premises, he might be estopped from denying that he had adopted the line which was the basis of the tenant's action. But the prayer for instructions wholly omits the element of any knowledge by the demandant of the tenant's expenditures.

The instruction which was given was undoubtedly correct as an abstract proposition: "That if there had been a general agreement among all the owners to establish new division lines, which agreement fell through because some of them refused to execute the subsequent conveyances necessary to complete the arrangement, it would not estop the demandant from claiming in this action." Certainly an agreement that fell through because it was never completed would not estop anybody. The only doubt we have in relation to it is, whether it gave the jury a sufficient direction upon the point which the tenant wished should be submitted to them, and which he probably intended to present in his prayer for instructions, although it was imperfectly expressed. That the agreement was not conclusive, had already been decided; and the instruction does not allude to the subsequent acts of the tenant, in incurring

expense upon the faith of his understanding that the line had been settled.

We were led to apprehend from these considerations that the true point in issue had not been presented to the mind of the jury, and that there had consequently been a mistrial. But on examining all the evidence reported, we do not find that the tenant showed or offered to show that the demandant knew or had notice of the fact that he was expending money on the faith of a supposed agreement as to the lines. As no request for instructions was made which included the fact of such knowledge, and as it does not appear that any ground for such instructions existed upon the evidence, it is not a sufficient reason to disturb the verdict, that the judge omitted to explain to the jury what would have been sufficient to create an estoppel.

Exceptions overruled.

ESTOPPEL AS TO MISTAKEN BOUNDARY LINES: See *McAfferty v. Conover's Lessee*, 70 Am. Dec. 57; *Lindell v. McLaughlin*, 77 Id. 593, and cases in notes thereto; and see the principal case commented upon in *Proprietors of Liverpool Wharf v. Prescott*, 7 Allen, 496, in this respect.

NOWELL v. WRIGHT.

[3 ALLEN, 166.]

PUBLIC OFFICER IS RESPONSIBLE FOR ACTS OF MISFEASANCE, where his services are voluntary and attended with compensation, and his duty is entire, absolute, perfect, and personal, and not only one which he is under obligation, but clothed with ability, to perform, both in the means furnished him, and the legal authority to act, irrespective of superior officers.

TENDER OF DRAW-BRIDGE IS LIABLE FOR INJURIES CAUSED BY IMPROPER DISCHARGE OF HIS DUTIES, where, although he is appointed by the state, he has a salary, and has the exclusive management and direction as to the proper opening of the draw, and all precautionary measures in relation thereto.

OPINIONS OF WITNESSES RELATIVE TO DUTY OF TENDER OF DRAW-BRIDGE are inadmissible in an action against him for injuries caused by the improper discharge of his duties.

TORT against John Wright, appointed tender of the Warren bridge draw under statutes of Massachusetts, to recover damages for injuries sustained by the plaintiff's wife by falling into the Charles river in the night-time, through the negligence of the defendant in not shutting the gates and hanging out lanterns while opening the draw. Further facts are stated

in the opinion. The plaintiffs had a verdict, and the defendant alleged exceptions.

T. Willey, for the plaintiffs.

M. G. Cobb, for the defendant.

By Court, DEWEY, J. It may be a delicate, if not a difficult, task to mark with precision the line of discrimination between the various classes of public officers or agents created by statute, and whose duties are defined by statute, who may be held responsible to individuals in an action on the case for injuries resulting from the improper execution of their official duties. That many such officers and agents have been so held responsible, the adjudged cases abundantly show.

While admitting the general principle, Chancellor Kent, in *Bartlett v. Crozier*, 17 Johns. 450 [8 Am. Dec. 428], would confine the right of action to cases where the services of the officer are not gratuitous or coerced, but voluntary and attended with compensation; and also where the duty to be performed is entire, absolute, and perfect. To this, we may add that the duty should be a personal one, and not only one which he is under obligation, but clothed with ability, to perform, both in the means furnished to him, and the legal authority to act, irrespective of superior officers.

Another element, also, when found to exist in a particular case, may be a controlling circumstance in respect to an agent, namely, that the act complained of was a misfeasance. This has sometimes been held to rebut a defense of agency, where the party would avoid a responsibility on the ground that he was a mere agent, acting under a superior, as in *Bell v. Josselyn*, 3 Gray, 309 [63 Am. Dec. 741].

In *Jones v. Bird*, 5 Barn. & Ald. 837, the commissioners of sewers were held responsible to a third person for an act done by them in the discharge of their duty as required by statute, it being found that they had acted carelessly and negligently, although if they had acted with due care they would not have been responsible. In *Hall v. Smith*, 2 Bing. 156, while refusing to charge for defendants upon the facts there found, Best, C. J., says: "If commissioners under an act of parliament order something to be done which is not within the scope of their authority, or are themselves guilty of negligence in doing that which they are empowered to do, they render themselves liable to an action, but they are not answerable for the misconduct of such as they are obliged to employ." In the case

of *Schinotti v. Bumsted*, 6 T. R. 646, it was held that an action on the case lies against ministerial officers for a neglect of duty. The defendants in that case were the managers and directors of a lottery authorized by statute, and their duties were prescribed by statute. In the case of *Bartlett v. Crozier*, 15 Johns. 250, in an action by an individual against an overseer of highways for an injury sustained through want of repair thereof, the supreme court of New York held the broad doctrine that where an injury is suffered by the act of a public officer contrary to his duty, the party injured may maintain an action on the case against the officer, and they accordingly rendered judgment against the defendant. That case was subsequently reversed by the court of errors, not because the principle above stated was wrong, but because in the case of overseers of highways there was no such responsibility attaching, they not being clothed with authority, or charged with the absolute duty, required to charge them: *Bartlett v. Crozier*, 17 Johns. 450 [8 Am. Dec. 428]. A similar view with this was taken as to the case of a surveyor of highways in this commonwealth, and we suppose for like reasons it was held that he would not be liable to such an action at the suit of an individual: *White v. Phillipston*, 10 Met. 108.

It becomes necessary to ascertain the particular nature of the office or agency held by the defendant, and how far his personal responsibility attached in reference to the matter complained of, as occasioning an injury to the plaintiff.

This office is held under the provisions of the statutes of 1856, chapter 282, and 1859, chapter 186, the latter of which modifies the former. It will be found that the office is not a mere honorary appointment for gratuitous service, but an office with a salary of one thousand one hundred dollars per annum; that the officer thus appointed has full control of the passing of all vessels through the draw of the bridge; that the statute requires that he shall furnish all the assistance necessary for opening and closing such draw, and for the performance of all the duties required of him; and that he shall have the care of the lamps upon the bridge, and perform all the labor necessary in lighting the same. In reference to this agency, so far as the proper opening of the draw was concerned, and all precautionary measures in relation thereto, it will be seen that the defendant had the exclusive management and direction. In the discharge of this duty he was not dependent upon the

order of a superior, and the means were furnished to him adequate to the full discharge of his agency.

Under these circumstances, a personal liability attached to him for an injury to a third person, caused by his improper discharge of his duties. His act was not a mere naked act of non-feasance. The opening the draw was the cause of the injury. That act was done by the defendant. It is true that it was lawful and proper to open the draw, but such opening was to be done in a proper manner. That required due regard and caution for the safety of travelers passing the bridge, and the use of reasonable safeguards for their protection. The defendant, by omitting to discharge his duty in this respect, may be held responsible for an injury occasioned thereby. In an action against him, as in all similar cases, the plaintiff must have been in the exercise of ordinary care and prudence on his part, before any claim for damages can be established.

That being shown, the jury were properly instructed that the defendant was bound to use reasonable care in reference to the safety of travelers passing over and upon the bridge while the draw was open, and for any negligence in this respect he would be liable to any person injured solely through such negligence.

To the rulings of the court, as to the liability devolving upon the defendant, resulting from his holding and exercising the office of tender of the draw-bridge, we see no ground for exception.

Upon the other point presented by the bill of exceptions, namely, the admission of evidence of tenders of other draw-bridges, as to their opinions of the necessity of keeping gates shut, and hanging out lanterns for the proper protection of travelers, while the draw was open in the night-time, we think the court erred; such evidence being liable to the same objection as was taken in *Raymond v. Lowell*, 6 Cush. 531 [53 Am. Dec. 57], that it is merely the opinions of witnesses relative to the duty of the draw-tender. As to this point, the exceptions must be sustained, if the defendant deems it useful to have another trial.

RESPONSIBILITY OF PUBLIC OFFICERS, WHOSE DUTIES ARE MINISTERIAL, FOR ACTS OF MISFEASANCE: See *Wilson v. Mayor etc. of New York*, 43 Am. Dec. 719, and note collecting prior cases; *Bailey v. Mayor etc. of New York*, 28 Id. 669; note to *Concell v. Voorhees*, 42 Id. 208; *Teall v. Tilton*, 49 Id. 352; *Rochester White Lead Co. v. City of Rochester*, 51 Id. 316; and see *American Print Works v. Lawrence*, 57 Id. 420. The principal case is cited in *Williams* AM. DEC. VOL. LXXX-5

v. *Adams*, 3 Allen, 172, to the point that public officers having a compensation are liable for damages resulting from default in the performance of their duties.

EXPERT TESTIMONY, WHEN ADMISSIBLE: See *Hammond v. Woodman*, 66 Am. Dec. 219, and extensive note thereto. The testimony of an expert as to the impossibility or improbability that a party could have sustained injury without carelessness on his part is incompetent: *Burton v. Somerset Pottery Works*, 121 Mass. 448; as is his testimony that a cattle-guard or barrier was necessary at a particular point, in an action for an injury to a horse, caused by the defective construction of a railroad: *Amstein v. Gardner*, 134 Id. 10, both citing the principal case.

THE PRINCIPAL CASE IS CITED in *Osborne v. Morgan*, 130 Mass. 103, 104, to the point that it is misfeasance, and not non-feasance, for which an agent may be liable, if he undertakes the execution of a work, and then abandons it, leaving it in a dangerous condition.

WYMAN v. FISKE.

[3 ALLEN, 233.]

PROMISSORY NOTE GIVEN IN CONSIDERATION OF MONEY ADVANCED AT REQUEST OF MAKER TO BROKER, for losses sustained in stock-jobbing transactions, in violation of statute, is valid.

BURDEN OF PROOF IS ON MAKER OF PROMISSORY NOTE TO ESTABLISH ILLEGALITY OF CONSIDERATION, if he resists payment on that ground.

MONEY VOLUNTARILY PAID FOR LOSSES IN STOCK-JOBGING TRANSACTIONS, in violation of statute, cannot be recovered back.

CONTRACT to recover from the defendant, a broker, the balance due the plaintiff upon certain transactions in buying and selling stocks. The defendant had a verdict, and the plaintiff alleged exceptions. The opinion states the facts.

A. H. Fiske, for the defendant.

By Court, CHAPMAN, J. The plaintiff's account annexed to his writ, and the defendant's account filed in set-off, have been examined by an auditor, who reports a balance of four thousand seven hundred and eighty-seven dollars and thirty-two cents due to the defendant. The plaintiff objects to several of the items in the account stated by the auditor.

1. The auditor credits the defendant with a note of one thousand seven hundred and twenty-four dollars and twenty-eight cents. In respect to this item, it was proved that one Wheelock, a broker, contracted to sell on time, for the plaintiff, certain stocks which he did not own, and of which he had not the control; that Wheelock purchased other stocks in order to fulfill this contract; that this transaction resulted in a loss

of one thousand seven hundred and twenty-four dollars and twenty-eight cents, and that the defendant, knowing the facts, paid this sum to Wheelock for the plaintiff, and took this note therefor. The plaintiff contended, before the auditor, that this transaction was within the statute of 1836, chapter 279, which is re-enacted in the general statutes, chapter 105, section 6, against stock-jobbing. It provides, in substance, that all contracts for the sale or transfer of stock shall be absolutely void unless the party contracting to sell or transfer is, at the time of making the contract, the owner or assignee of the stocks, or authorized by the owner or assignee or his agent to make the sale. But it does not make the act penal, and does not, like the statutes of England and New York on the same subject, provide that any money paid on such a contract may be recovered back. It merely denies to the parties all legal aid in enforcing such contracts; and this places them on similar ground with oral agreements that are within the statute of frauds. It is not criminal to make them; they are merely deprived of legal validity.

It is clear that the plaintiff's contract, which he made through his broker, Wheelock, was within the statute. It is not necessary to decide whether Wheelock could have compelled the plaintiff to refund the money which he had advanced for the plaintiff to enable him to make good his losses; for if the plaintiff chose to reimburse him, he had a legal right to do so. The payment would at least be legal as a gift; and the plaintiff, having a legal right to make this voluntary payment, had a right to procure a third person to make it, and such payment would be a valid consideration for a note. The note in question has such a consideration, and is therefore valid, and the auditor properly allowed it.

2. The auditor credits the defendant with a note of one thousand six hundred and forty-nine dollars and three cents. In respect to this item, it was proved that the defendant, by direction of the plaintiff, bought five hundred shares of the stock of the Vermont Central Railroad Company, and by direction of the plaintiff, afterwards sold the same for a less price, and took the plaintiff's note for one thousand six hundred and forty-nine dollars and three cents, that being the amount of the difference and commissions. There was no evidence that the seller had the stock, or was authorized to sell it, at the date of the contract of purchase. This item was properly credited to the defendant by the auditor; for the bur-

den was on the plaintiff to prove that the transaction was within the statute, and the above evidence does not establish the fact. It does not appear affirmatively that the seller had not the stock, or was not authorized to sell it. The doctrine that a contract is presumed to be legal till the contrary is proved is too well established to require the citation of authorities.

3. The auditor credits the defendant with a note of three thousand six hundred and fifty-three dollars and fifty-three cents. In respect to this note, it was proved that the defendant, at the plaintiff's request, contracted to sell for him, on time, certain stocks which he did not own, and of which he had not the control; that the defendant purchased stocks to fulfill this contract; that this transaction resulted in a loss; that in settlement of this transaction the plaintiff was charged with the difference which the defendant had paid, and with commissions one hundred and sixty-two dollars and fifty cents, and with the same commissions on the purchase; that with the plaintiff's consent, the defendant applied to the payment of these charges the sum of six hundred dollars, which the plaintiff had before deposited with him on general account; also the sum of two thousand five hundred and ninety-four dollars and seventy-two cents, the difference in the plaintiff's favor on a purchase and sale of stocks which the defendant had before made as his agent, and in discharge of the balance took the note in question.

The plaintiff contended before the auditor that this note was void, and therefore ought not to have been credited, and also that the defendant ought to have been charged with the above sums of six hundred dollars and two thousand five hundred and ninety-four dollars and seventy-two cents. As to these two sums, the appropriation of them by the defendant's consent was equivalent to a voluntary payment. Money thus paid cannot be recovered back either at common law or by the provisions of the statute. The validity of the note need not be considered, as its amount is less than the balance found due to the defendant, and his counsel consents to remit the whole balance, and take judgment for costs only.

Judgment for the defendant, for costs.

BURDEN OF PROOF AS TO WANT OF CONSIDERATION OF NOTE: See *Jennison v. Stafford*, 48 Am. Dec. 594, and the note thereto. The principal case is cited in *Smith v. Sac County*, 11 Wall. 154, per Clifford, J., dissenting, to

the point that the owner of a negotiable instrument is entitled to recover upon it if he came by it honestly, and that fact is implied *prima facie* by possession, and to meet the inference so raised, fraud, felony, or some such matter must be proved.

MONEY VOLUNTARILY PAID, WITH FULL KNOWLEDGE OF FACTS, CANNOT BE RECOVERED BACK: *Stevens v. Head*, 31 Am. Dec. 617; *Norton v. Marden*, 32 Id. 132; *Beecher v. Buckingham*, 44 Id. 580; note to *Mayor of Baltimore v. Lefferman*, 45 Id. 153; *Robinson v. Charleston*, Id. 739; *Baltimore etc. R. R. v. Fausce*, 46 Id. 655; *Boutelle v. Melendy*, 49 Id. 152; *Benson v. Monroe*, 54 Id. 716.

MERRIAM v. WOLCOTT.

[3 ALLEN, 253.]

VENDOR MAY RECOVER BACK MONEY PAID TO BROKER FOR FORGED NOTE, sold by the broker without disclosing the name of his principal, although the broker has paid over the money to his principal, there having been no unreasonable delay in giving notice of the forgery after discovery, and although the note was sold for a sum less than its face.

CONTRACT against the defendants to recover back money paid to them for two notes. The notes purported to be made by H. J. Libby & Co., payable to their own order, and indorsed by them. They had been given by one E. O. Libby to the defendants for sale, and were sold to the plaintiff, without indorsement by the defendants, for a price less than their face value, equal to twelve per cent per annum for the time they had to run, and one eighth of one per cent, equal to one half of the defendants' commissions. The proceeds of the sale, less commissions and advances, were turned over to E. O. Libby on the day of the sale. It was afterwards discovered that the signatures of H. J. Libby & Co. were forged, but this fact was unknown to the defendants or the plaintiff until subsequently to the maturity of the notes. It was known to the plaintiff that the defendants acted as brokers, but the name of their principal was not disclosed. Nothing was said at the time of the sale in regard to the genuineness of the signatures. Judgment was rendered for the defendants, and the plaintiff appealed.

H. C. Hutchins, for the plaintiff.

J. G. Abbott, for the defendants.

By Court, CHAPMAN, J. The first question presented by this case is, whether a person who purchases a note of a broker for cash, and takes the note by delivery, can recover back the

money paid, if the maker's signature turns out to be forged. The text-books state the law to be, that he can recover it back on the ground of an implied warranty that the note is in reality what it purports to be: Bayley on Bills, 148; Chitty on Bills, 10th Am. ed., 245. The English cases are referred to in these treatises. The recent case of *Gurney v. Womersley*, 4 El. & Bl. 132, asserts the same doctrine. It has been repeatedly so held in New York: *Markle v. Hatfield*, 2 Johns. 455 [3 Am. Dec. 446]; *Herrick v. Whitney*, 15 Id. 240; *Shaver v. Ehle*, 16 Id. 201; *Murray v. Judah*, 6 Cow. 484; *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.), 287. It is so held in Rhode Island: *Aldrich v. Jackson*, 5 R. I. 218. Also in Vermont: *Thrall v. Newell*, 19 Vt. 202 [47 Am. Dec. 682]. But there are two cases which state a distinction in respect to this implied warranty that is not recognized in the other cases. The first is *Ellis v. Wild*, 6 Mass. 321. The plaintiff had purchased of the defendant two promissory notes, both of which, without the knowledge of either party, had forged indorsements. They were taken in payment for a quantity of rum. The court held that if it was the original intent of the plaintiff to buy the notes and to make payment in rum, the defendant was not liable; but if the payment by the notes was not a part of the original stipulation, but an accommodation to the defendants, then he was liable, on the ground that he had not paid for the rum. Some early English cases are referred to as authorities for this distinction. The other case is *Baxter v. Duren*, 29 Me. 434 [50 Am. Dec. 602], and it states the same doctrine.

If this is the law of this commonwealth, then the plaintiff cannot recover; for he bought the notes for cash, and did not take them in payment of a debt. But it is difficult to see any valid reason for such a distinction. Whether the purchaser pays cash or discharges a debt in payment for the forged paper, the injury is the same to him. There is in both cases a failure of consideration growing out of a mistake of facts. The actual contract and the implied understanding as to the genuineness of the note is in both cases the same. And we think that the authorities which hold the seller to an implied warranty, in such case, that the note is genuine, are in conformity with the principles of sound reason and justice, and with the understanding of the parties in making such a contract. In *Cabot Bank v. Morton*, 4 Gray, 156, the case of *Ellis v. Wild*, 6 Mass. 321, is not noticed; but it is held that one who gets a note discounted at a bank, without indorsing it impliedly, warrants

that its signatures are genuine. The two cases are therefore contradictory. The doctrine held in *Lobdell v. Baker*, 1 Met. 193 [35 Am. Dec. 358], in effect goes beyond any of the cases cited. The note sold was indorsed by a minor. It was held that upon the sale there was an implied warranty that the indorsement was by a person capable of binding himself by a valid contract. A warranty which goes to that extent includes the idea that there is a genuine signature. In that case, the note was not sold to pay a debt, but for cash, and that point was not regarded as material.

2. Another question raised is, whether the fact that the defendant made the sale as a broker, but without disclosing the name of his principal, relieves him from his liability. The authorities establish his liability as principal: 2 Kent's Com., 6th ed., 630; *Gurney v. Womersley*, 4 El. & Bl. 132; *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.), 287; *Cabot Bank v. Morton*, 4 Gray, 156.

3. A third question is, whether he is relieved from his liability by the fact that he had paid over the money to his principal before it was demanded by the plaintiff. We think he is not, there having been no unreasonable delay in giving him notice of the forgery after it was discovered: *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.), 287; *Fuller v. Smith, Ry. & M.* 49.

And we think the deduction made to the purchaser of the notes does not alter the nature of the transaction. It did not, as the defendants contend, create a partnership in the commissions, but merely fixed the amount to be paid for the notes.

Judgment for the plaintiff.

VENDOR MAY RECOVER BACK MONEY PAID FOR FORGED NOTE: Note to *Baxter v. Duren*, 50 Am. Dec. 602. There is an implied warranty by one who sells negotiable paper that the names upon it are genuine: *Id.*; *Potts v. Chapin*, 133 Mass. 282; *Boston etc. R. R. v. Richardson*, 135 Id. 475; and see *Lillibridge v. Tregant*, 30 Mich. 114, all citing the principal case.

THE PRINCIPAL CASE IS CITED in *Beal v. Roberts*, 113 Mass. 527, to the point that if the signature of the maker of a promissory note is admitted to be genuine, he is liable in some form of action to one to whom he sold it, although the payee's indorsement is forged; it is referred to in *Carpenter v. Northborough Nat. Bank*, 123 Id. 70, on the point that where the maker of a promissory note pays the amount due thereon to a bank, which discounted it for one who forged the payee's indorsement, the maker may recover back the money from the bank, although it took the note in good faith; and see it also referred to, on the question of laches in recovering back money paid on forged paper, in *National Bank v. Bangs*, 106 Id. 444; and it is cited in *Worthington v. Cowles*, 112 Id. 32, to the point that to relieve an agent from liability upon

an implied warranty of the genuineness of a promissory note sold by him, which afterwards proves to be forged, the transaction must have been such that the purchaser understood, or ought as a reasonable man to have understood, that he was dealing with the principal; and see *Mason v. Mason*, 123 Mass. 480.

McDONOUGH v. GILMAN.

[3 ALLEN, 264.]

TENANT FOR YEARS IS LIABLE FOR RESTORING BUILDING, CONSTITUTING NUISANCE, which was erected by his lessors, before the commencement of the tenancy, and abated afterwards; but he is not liable for merely refitting the building after it was injured.

TENANT FOR YEARS IS NOT LIABLE FOR CONTINUING NUISANCE existing at the commencement of his tenancy, unless he is requested by some unequivocal language to remove it.

CASE for nuisance. The opinion states the facts.

C. H. Hudson, for the plaintiff.

T. L. Wakefield, for the defendant.

By Court, CHAPMAN, J. The plaintiff's declaration in this case is very loose and inartificial; but the amended count on which he relies states in substance that he has a right of way, as therein described, and that the defendant has obstructed it by erecting and maintaining on a part of it a staircase, privy, and vault. On the trial, it appeared that these structures were placed there, not by the tenant, who is a lessee for years, but by his lessors; and that his lease contains the following clause: "The passage-ways around the said buildings [the leased premises] are reserved by the lessors, who hereby lease only the right of such use thereof as may be necessary for the enjoyment of the buildings aforesaid." One of these passage-ways is the way in question; and the fee of the land is in the lessors, subject to the plaintiff's right of way. The privy and vault existed before the defendant became tenant, about eighteen years ago. It does not appear when the staircase was built.

The instruction to the jury, that if they found the privy was a nuisance, and the plaintiff abated it, and the defendant restored it, he is liable, was correct. For in such case, the existing nuisance would have been erected by him, and not by his lessor. But the instruction does not appear to be applicable to the facts as reported. It is stated, that "on one occasion

the plaintiff commenced beating down said staircase with his ax, when the defendant restrained him therefrom; and on one occasion the plaintiff beat off the boards from said privy, and the defendant refitted it." It is not stated that the plaintiff removed the frame of the privy. He merely knocked off the boards, which would make it none the less a nuisance, and the defendant merely refitted it, which did not make it any more a nuisance than before. The act would be merely keeping and maintaining it, not erecting it. It would be like the case of *Beswick v. Cunden*, Cro. Eliz. 520. In that case, the declaration alleged that the defendant kept and maintained a bank, by which a brook was caused to flow around the plaintiff's land. The court said: "There is not here any offense committed by the defendant; for he allegeth that he kept and maintained a bank, which is, that he kept it as he found it; and it is not any offense done by him, for he did not do anything; and if it were a nuisance before his time, it is not any offense in him to keep it." And the case is distinguished from other cases where every using is a new nuisance, as the using of an aqueduct, which takes water wrongfully from another. There, every turning of the cock to let the water flow is a new nuisance. The act of refitting the privy must have been an act which rendered it more a nuisance to the passageway than it would otherwise have been, to make the defendant liable as an erector of the nuisance.

The act of the defendant in restraining the plaintiff from beating down the staircase with an ax is not embraced in this ruling, and the character and circumstances of the act do not fully appear.

The other instructions excepted to were as follows: "That if the privy and staircase were an obstruction of the plaintiff's right of way, then the tenant is liable to an action, if the obstruction continued, and if he occupied the premises after notice was given to him by the plaintiff to remove the obstructions, although they were erected by his landlord; and that the law does not prescribe the kind of notice which should thus be given by the plaintiff to the defendant to remove said obstructions;" and he submitted the question to the jury, whether such notice had or had not been given. The report states all the evidence of notice that was offered, and it is as follows: "The plaintiff complained to the defendant of the erection of the staircase, at the time when it was erected; and on another occasion the plaintiff asked the defendant how he

thought he could drive a team with two tons of coal by said stairway to his house." His attempting to beat down the staircase with an ax, and knocking the boards off from the privy, are not a notice. The court are of opinion that this instruction was not quite correct.

In *Penruddock's Case*, 5 Co. 100 b, it was resolved that an action lies against one who erects a nuisance, without any request made to abate it, but not against the feoffee, unless he does not reform the nuisance after request made. In *Winsmore v. Greenbank*, Willes, 583, *Penruddock's Case*, *supra*, is referred to, with the remark that the law is certainly so. In 2 Ch. Pl., 6th Am. ed., 770, note, pleaders are advised to allege in the declaration a special request to remove the nuisance, in actions against the grantee of the premises. In *Pierson v. Glean*, 14 N. J. L. 37 [25 Am. Dec. 497], Hornblower, C. J., says: "The law as settled in *Penruddock's Case* has never, I believe, been seriously questioned since." This action was for maintaining a dam erected by a former owner, and it was held that it could not be maintained without a request to reform the nuisance.

In *Woodman v. Tufts*, 9 N. H. 92, the same doctrine is held, and the court proceed to say: "And the question arises, what that request must be. It undoubtedly must be so distinctly and definitely stated as to convey clearly the ground of the complaint, with a notice that the plaintiff will not longer submit to the continuance of the cause of the injury." "No particular form of words is required." This does not quite come up to the law of *Penruddock's Case*, *supra*.

We think that there should be, in some unequivocal language, a request to the tenant to reform or remove a nuisance, before he can be held liable for its continuance. It is not unreasonable to hold the plaintiff who proceeds against the lessee to this strictness. The landlord or grantor himself is liable, notwithstanding his lease or grant, for the continuance of the nuisance. This was settled in *Roswell v. Prior*, 12 Mod. 635. In that case, the plaintiff had recovered against the defendant for erecting a building which stopped the plaintiff's ancient lights. The defendant had granted over the ground with the nuisance to another, and contended that he was no longer liable, but that the action should be against the lessee. But the court said: "Surely this action is well brought against the erector, for before his assignment over he was liable for all consequential damages, and it shall not be in his power to discharge himself by granting it over, and more especially

here, where he grants over, reserving rent, whereby he agrees with the grantee that the nuisance should continue, and has a recompense, viz., the rent for the same; for surely when one erects a nuisance, and grants it over in that manner, he is a continuer with a witness." But the tenant who merely enters upon the premises and occupies them, under an obligation to pay rent for the whole and to commit no waste, cannot reasonably be regarded as a wrong-doer till the party injured distinctly and unequivocally complains to him of the injury, and informs him that he is expected to act in the matter and remove it. In *Ryppon v. Bowles*, Cro. Jac. 373, it is said that Coke, C. J., inclined to the opinion that a tenant for years is not liable for the mere occupation of a building erected by his lessor, and which obstructs the plaintiff's lights, because his tearing down the building would be waste as to his landlord.

In the present case, the language proved does not amount to a request, and the jury should have been so instructed; for though verbal communications are to be construed by the jury under instructions from the court, yet when a communication cannot by any fair interpretation be regarded as a sufficient notice or request, the jury should be so instructed as to its meaning.

Exceptions sustained.

GRANTEE OR LESSOR IS LIABLE FOR CONTINUANCE OF NUISANCE after he has been notified to remove it, but not before: Note to *Plumer v. Harper*, 14 Am. Dec. 338; note to *City of Lowell v. Spalding*, 50 Id. 783; *Pillsbury v. Moore*, 69 Id. 91. The principal case is cited to this effect in *Nichols v. City of Boston*, 96 Mass. 43; *Fowle v. New Haven etc. Co.*, 107 Id. 355; *Brown Paper Co. v. Dean*, 123 Id. 269; *Prentiss v. Wood*, 132 Id. 489; *Slight v. Gutt-laff*, 35 Wis. 677; but the one who erected the nuisance is liable: *Brown Paper Co. v. Dean*, *supra*; *Prentiss v. Wood*, *supra*; *Inhabitants of New Salem v. Eagle Mill Co.*, 138 Id. 8, all citing the principal case: see also, on this point, *Plumer v. Harper*, 14 Am. Dec. 333, and note; *Wagoner v. Jermains*, 45 Id. 474; *Fish v. Dodge*, 47 Id. 254; note to *City of Lowell v. Spalding*, 50 Id. 780.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

WILLIAMS v. VAIL.

[9 MICHIGAN, 162.]

MEASURE OF DAMAGES IN ACTION ON REPLEVIN BOND IS AMOUNT OF JUDGMENT RECOVERED in the replevin suit, when a return of the property is waived and a judgment for its value obtained, in accordance with the statute; and the damages cannot be reduced by showing that the plaintiff in the action on the bond was but a part owner of the property.

EXECUTION IS NOT EXECUTION UPON JUDGMENT IN REPLEVIN, so that upon its return unsatisfied an action upon the replevin bond can be maintained, where, after judgment for the defendant in replevin for the value of the property, the execution is issued in form in *assumpsit*, and purporting to be issued in favor of a plaintiff.

ACTION on a replevin bond. The opinion states the facts.

J. Sullivan and J. B. Clarke, for the plaintiffs in error.

F. Muzzy, contra.

By Court, CAMPBELL, J. Vail recovered a judgment below against Williams, as principal, and Beckwith and Kingsbury, as sureties on a replevin bond; Williams having become non-suit in the original replevin suit, and Vail having recovered a judgment for the value of the property, with the costs of his defense.

The errors assigned cover two points: 1. The ruling of the court below, whereby the right of action was maintained on the return of the execution referred to in the record; 2. The refusal of the court to permit evidence to show that Vail was but a part owner of the property replevied, for the purpose of reducing damages.

We think that the court rightly excluded the evidence of the want of title in Vail. The statute allows the defendant in a replevin suit, when the plaintiff becomes nonsuit, if entitled to a return of the property, to waive it, and have a judgment for the value. And in a suit on the bond, the measure of damages is the amount recovered in such action of replevin, and remaining uncollected: Comp. L., sec. 5044. Where the statute provides the exact measure of damages, there is no authority to reduce it: See *Dorr v. Clark*, 7 Mich. 310.

But we think the court erred in the view taken of the execution and the liability of the parties upon the bond under it. The obligation of the bond, as regulated by the statute, creates no liability until an execution issued in favor of the defendant in the action shall be returned unsatisfied in whole or in part: Comp. L., sec. 5043. This of course means an execution which in law is such as could properly be issued on the judgment. The judgment was in favor of a defendant in replevin, and appears—as the law requires—to be for the value of the goods replevied, as assessed by the court, together with the costs of his defense. The execution is not an execution in replevin at all, but an execution for damages in *assumpsit*, which is an entirely different form of action. Not only is this so, but it is a plaintiff's, and not a defendant's, execution, and therefore in no sense corresponds with the judgment. It was not amended while in the sheriff's hands, or before action brought, and does not so correspond with the replevin proceedings that any court could properly read them together as part of the same record. It was not in any proper sense an execution upon that judgment.

The judgment must be reversed, with costs, and a new trial granted.

The other justices concurred.

THE PRINCIPAL CASE IS CITED in *Phillips v. Waterhouse*, 40 Mich. 273, to the point that, under the statute, there is no liability on a replevin bond, without proof of execution in the action; in *Wright v. Hake*, 38 Id. 531, to the point that sureties are concluded by a judgment against their principal, when it has been obtained in the customary manner and in the course of regular proceedings; and it is referred to in *Henry v. Quackenbush*, 48 Id. 418, to the effect that section 6766, compiled laws of Michigan, seems expressly intended to protect sureties against being concluded by a judgment against their principal in a replevin suit; and see *Lindner v. Brock*, 40 Id. 620, 621.

CITY OF DETROIT v. COREY.

[9 MICHIGAN, 165.]

RULE OF RESPONDEAT SUPERIOR IS APPLICABLE when the relation of principal and agent or master and servant exists; but not when the relation is that of contractor only.

RELATION OF CONTRACTOR EXCLUDES THAT OF PRINCIPAL AND AGENT of master and servant, in all ordinary transactions; but there is not necessarily such a repugnance between them that they cannot exist together.

RELATION OF CONTRACTOR AND OF PRINCIPAL AND AGENT MUST NECESSARILY EXIST TOGETHER, where one contracts with a municipal corporation to construct a sewer through one of its streets.

MUNICIPAL CORPORATION'S POWER TO CONSTRUCT SEWERS THROUGH ITS STREETS IS SPECIAL LEGISLATIVE GRANT for private purposes, and is not a power given to the corporation for governmental purposes, or a public municipal duty imposed upon it, as to keep its streets in repair, and the like.

MUNICIPAL CORPORATION TAKES POWER TO CONSTRUCT SEWERS THROUGH ITS STREETS WITH UNDERSTANDING that the power shall be so executed as not unnecessarily to interfere with the rights of the public, and that all needful and proper measures shall be taken in its execution to guard against accidents to persons lawfully using the streets at the time. The corporation is bound for the performance of these obligations, and cannot rid itself of their performance by executing the power through agents.

MUNICIPAL CORPORATION IS LIABLE FOR INJURIES CAUSED BY NEGLIGENCE OF CONTRACTOR in not placing guards to an excavation in its streets for a sewer, although the corporation was required by its charter to let the contract to the lowest bidder, and the contract provided that the contractor should at all times keep the excavation fenced in or carefully guarded, and should be liable for all damages that might arise from accidents caused by his neglect.

CASE, brought by Jerome B. Corey against the city of Detroit, for damages sustained by the plaintiff's wife in falling into an unguarded excavation for a sewer in one of the streets of the city. The excavation was made under a contract let by the city, as required by its charter, to the lowest bidder. The contract bound the contractor at all times to "keep the excavation fenced in or carefully guarded, as provided by the city ordinances, so as to prevent accident to the traveling public, and shall be liable for all damages that may arise from accidents in any way caused by neglect of the same." The excavation was left unguarded, and the plaintiff, in a dark night, drove into it, and his wife was injured. The plaintiff had a verdict, under the instructions of the court. The questions in the case relate to the liability of the city.

J. L. Chipman and G. V. N. Lothrop, for the plaintiff in error.

Maynard and Meddaugh, and C. I. Walker, for the defendant in error.

By Court, MANNING, J. The only question in this case is the liability of the city.

It was said on the argument that the contractors, and not the city, are liable, as the sewer was being constructed by them under a contract with the city when the accident occurred.

When the relation of principal and agent or master and servant exists, the rule of *respondeat superior* is applicable, but not when the relation is that of contractor only. In all ordinary transactions, the relation of contractor excludes that of principal and agent, or master and servant. But there is not necessarily such a repugnance between them that they cannot exist together. The difference between them is, that a contractor acts in his own right and for himself, whereas an agent or servant acts for and in the name of another.

In the case before us, both relations exist, and must necessarily exist from the peculiar character and circumstances of the case. The contractors not only acted for themselves, but at the same time as agents for the city, under the power given it to construct sewers in its streets, which are public highways. They had no right to make the excavation they did, except as agents for the city; and had they been proceeded against by indictment for creating a public nuisance, they could not have justified in their own right, but would have had to justify as agents of the city under their contract.

It is also to be observed that the power under which they acted, and which made that lawful which would otherwise have been unlawful, was not a power given to the city for governmental purposes, or a public municipal duty imposed on the city, as to keep its streets in repair, or the like, but a special legislative grant to the city for private purposes. The sewers of the city, like its works for supplying the city with water, are the private property of the city—they belong to the city. The corporation and its corporators, the citizens, are alone interested in them—the outside public or people of the state at large have no interest in them, as they have in the streets of the city, which are public highways.

The donee of such a power, whether the donee be an individual or a corporation, takes it with the understanding—for such are the requirements of the law in the execution of the power—that it shall be so executed as not unnecessarily to

interfere with the rights of the public, and that all needful and proper measures will be taken, in the execution of it, to guard against accidents to persons lawfully using the highway at the time. He is individually bound for the performance of these obligations; he cannot accept the power divested of them, or rid himself of their performance by executing it through a third person, as his agent. He may stipulate with the contractor for their performance, as was done by the city in the present case, but he cannot thereby relieve himself of his personal liability, or compel an injured party to look to his agent instead of himself for damages.

It was also said on the argument that the city was required by its charter to let the contract to the lowest bidder. I agree with counsel in this construction of the charter, when the work is done by contract, and the contract price exceeds two hundred dollars, as it does in this case. But I do not see in it any intention of the legislature to make the contractor only liable, and to relieve the city, which is benefited by the power, of its liability. The object of this provision in the charter is to protect the city against frauds too frequently concocted between faithless public functionaries and contractors, by which the public is sometimes made to pay much more for a thing than it is worth.

In *Lesh v. Wabash Navigation Co.*, 14 Ill. 85 [56 Am. Dec. 494], the company was authorized by its charter to enter upon certain premises, and take therefrom material for the construction of its works by making compensation therefor. The company contracted with certain individuals to build a dam, the contractors agreeing to furnish the material, which was taken by them from the land of the plaintiff, who claimed compensation of the company, and the court held the company liable on the ground that the contractors were the servants of the company. Caton, J., in delivering the opinion of the court, says: "The contractors were none the less the servants of the company because they were doing the work by contract, and for a stipulated price. The work was still done by the company, and under the authority of the charter. The privileges which the charter conferred upon the company to enable them to do the work devolved upon the contractors for the same purpose. The very erection of the dam across the river was an obstruction to its navigation, and would have been unlawful but for the authority conferred by the charter. Had the Culberstons been prosecuted for damages occasioned by reason of

such obstruction, they would immediately have sought protection under the charter. . . . Had a cause of action accrued to an individual by reason of the obstruction erected in the river, the company whose work it was would have been liable as much as if they had erected it with their own hands."

In *Bailey v. Mayor etc. of New York*, 3 Hill (N. Y.), 531 [38 Am. Dec. 669], the action was for damages done the plaintiff by the breaking of a dam erected across the Croton river, to supply the city of New York with water. The defense was that the action could not be maintained upon the principle of *respondeat superior*: 1. Because the water commissioners who had charge of the construction of the work were appointed by the state, and not by defendants; and 2. If they were to be regarded as having been appointed by defendants, that defendants, in building the dam, were acting in a public capacity, and like other public agents, were not responsible for the misconduct of those necessarily employed by them. Both points were ruled against defendants. Nelson, C. J., in delivering the opinion of the court, says: "The powers conferred by the several acts of the legislature authorizing the execution of this great work are not, strictly and legally speaking, conferred for the benefit of the public. The grant is a special, private franchise, made as well for the private emolument and advantage of the city as for the public good. The state, in its sovereign character, has no interest in it. It owns no part of the work. The whole investment under the law, and the revenue and profits to be derived therefrom, are a part of the private property of the city, as much so as the land and houses belonging to it situate within its corporate limits."

This decision was afterwards affirmed in the court of errors, the chancellor holding the defendants liable as the owners of the land on which the dam was erected, and other members of the court, on the ground stated by Chief Justice Nelson, in his opinion.

In *Storrs v. City of Utica*, 17 N. Y. 104 [72 Am. Dec. 437], which is a case of a sewer constructed in a public street under a contract with the city, and is in all respects analogous to the one before us, the city was held liable. The liability of the city is put on the ground of its duty to keep its streets in repair, and a like duty was urged on the argument as the ground of liability in the present case. While I concur in the correctness of the conclusions to which the court came in that case, I am unable to see how the execution of the power given

to the city to construct sewers is of itself an infringement of its duty to keep its streets in repair. The duty and power must be so construed as to be consistent with each other, and not repugnant the one to the other.

In *Inhabitants of Lowell v. Boston and Lowell Railroad*, 23 Pick. 24 [34 Am. Dec. 33], defendant was held liable for an injury to an individual by falling into a deep cut made in a highway, in the construction of the company's road by a contractor.

This case is commented on and approved by the same court in *Hilliard v. Richardson*, 3 Gray, 349 [63 Am. Dec. 743]. Thomas, J., after stating the facts in the case, says (p. 353): "Now, it is plain that it is the corporation that are intrusted by the legislature with the execution of these public works, and that they are bound, in the construction of them, to protect the public against danger. It is equally plain that they cannot escape this responsibility by a delegation of this power to others."

In *Reedie v. London and North Western Railway Co.*, 4 Exch. 244, *Barry v. City of St. Louis*, 17 Mo. 121, and perhaps some other cases, the corporation was held not to be liable. The distinction does not appear to have been taken, in these cases, between ordinary contractors who, doing only what it is lawful for any one to do, act in their own right, and contractors under a special legislative power, given for private purposes, rendering that lawful, in the donee of the power and those acting under him, which would otherwise be unlawful. The judgment of the court below, I think, should be affirmed.

MARTIN, C. J., and CHRISTIANCY, J., concurred.

CAMPBELL, J., dissented, being of the opinion that the city was not liable for the neglect of the contractor. He thought that the case came clearly within that class in which the employer, having made a fair and proper contract to do a lawful act in a lawful way, was not liable, if the contractor violated his duty, to the injury of a third person; and he repudiated the doctrine that the city had received certain privileges upon implied conditions which were not susceptible of performance without the action of the city, through agents for which it was responsible.

EMPLOYER'S LIABILITY FOR ACTS OR OMISSIONS OF CONTRACTOR: See *Stone v. Cheshire R. R.*, 51 Am. Dec. 192; *Blake v. Ferris*, 55 Id. 304; *Leshar v. Wabash Nav. Co.*, 56 Id. 494; *Hilliard v. Richardson*, 63 Id. 743, and the notes to these cases; *McGuire v. Grant*, 67 Id. 49; *Bonwell v. Laird*, 68 Id. 345; *Clark v. Fry*, 72 Id. 590, and note. The general rule is, that where work contracted for is not a nuisance *per se*, the employer will not be liable for injuries resulting from the wrongful acts or omissions of the contractor:

City of Logansport v. Dick, 70 Ind. 78; but under certain circumstances the employer may be liable: *Lake Superior Iron Co. v. Erickson*, 39 Mich. 498. Thus one who employs another to fill his ice-house, and obtains license from the municipal authorities to incumber the street for that purpose, cannot shield himself from liability for injuries caused by unlawfully obstructing the street, on the ground that his employer was a contractor, and alone liable: *Darmataetter v. Moynahan*, 27 Id. 189. So one who obtains a franchise from a municipal corporation is bound to see to its safe use: *McWilliams v. Detroit Central Mills Co.*, 31 Id. 277. The principal case is cited to the foregoing propositions.

MUNICIPAL CORPORATION IS LIABLE FOR NEGLIGENCE OF CONTRACTOR IN CONSTRUCTING PUBLIC WORK: *City of Buffalo v. Holloway*, 57 Am. Dec. 550; *Storrs v. City of Utica*, 72 Id. 437; *City of St. Paul v. Seitz*, 74 Id. 753; *contra: James v. San Francisco*, 65 Id. 528. The principal case is based upon the fact that sewers were private property of the city, in which the outside public or people of the state at large had no concern: *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 104, *per Cooley, J.*

THE PRINCIPAL CASE IS DISTINGUISHED in *City of Detroit v. Blackeby*, 21 Mich. 106, as not presenting the question whether a city is liable to a private action by an injured party for neglect to keep a cross-walk in repair; and it is not an authority for the proposition that damages for negligence may be recovered against a municipal corporation for an injury resulting from the plan of a public work, as distinguished from its mode of execution: *City of Lansing v. Toolan*, 37 Id. 153.

SMITH v. KENDALL.

[9 MICHIGAN, 241.]

INSTRUMENT IS PROMISSORY NOTE, when its makers promise to pay to the order of certain persons, at a time and place named, a sum of money, "with current exchange on New York."

INDORSE OF PROMISSORY NOTE MAY DECLARE THEREON AS ASSIGNEE.

ACTION by Kendall against the makers of the following instrument: "\$793.98. New York, July 13, 1858. Eight months after date, we, the subscribers, of Grand Rapids, county of Kent, state of Michigan, promise to pay to the order of Ely, Brown, & McConnell, seven hundred and ninety-three dollars and ninety-eight cents, at the banking house of Duncan Sherman & Co., value received, with current exchange on New York. Smith & McConnell." The paper was indorsed by the payees, but Kendall alleged in the declaration that he was their assignee. The plaintiff recovered judgment, and the defendants assigned as error that the instrument was not a promissory note, because it was not for the payment of a certain sum of money; and that the allegation that the plaintiff was assignee should have been proved.

J. T. Holmes, for the plaintiffs in error.

Withey and Gray, for the defendant in error.

By Court, MANNING, J. The instrument for seven hundred and ninety-three dollars and ninety-eight cents, it is argued, is not a promissory note, because it is payable with current exchange on New York. It calls for seven hundred and ninety-three dollars and ninety-eight cents, if paid in the city of New York; if paid elsewhere, it calls for that amount, with such additional sum, called exchange, as will make the amount where paid equivalent to seven hundred and ninety-three dollars and ninety-eight cents in the city of New York.

A promissory note must be for the payment of a certain sum of money. Exchange varies from time to time, and might have been more or less when the seven hundred and ninety-three dollars and ninety-eight cents were to be paid than when the instrument was given. Is this fluctuation, to which exchange is subject, such a contingency or uncertainty as the rule requiring a note to be for a sum certain was intended to guard against? We think not. Bills of exchange and promissory notes are commercial instruments, and to facilitate commerce are subject to certain rules of law not applicable to other contracts. These rules should be liberally construed, and in such a way as to effect the object had in view. Exchange is an incident to bills for the transmission of money from one place to another. Its nature and effect are well understood in the commercial world; and merchants having occasion to use their funds at their place of business sometimes make the currency at that point the standard of payments made to them by their customers at a different point. Such is the design of the instrument before us; and we believe such instruments are considered by commercial men to be promissory notes. In *Pollard v. Herries*, 3 Bos. & Pul. 335, P. deposited a sum of money with H. in Paris, and took H.'s note "payable in Paris, or at the choice of the bearer at the Union Bank in Dover, or at H.'s usual residence in London, according to the course of exchange upon Paris." This instrument was declared on as a promissory note, and spoken of and treated by both counsel and court as a promissory note. It is called a promissory note by the reporter, and treated as such by Mr. Chitty in his treatise on bills of exchange, pp. 232, 424. In *Leggett v. Jones*, 10 Wis. 34, a written promise to pay a sum of money, "with exchange on New York," was held to be a promissory note.

There is nothing in the other objection. The note was indorsed by Ely, Brown, & McConnell, and every indorsee is the assignee of the indorser.

The judgment must be affirmed, with costs.

MARTIN, C. J., and CHRISTIANCY, J., concurred.

CAMPBELL, J., delivered a dissenting opinion.

NOTE OR BILL TO BE NEGOTIABLE MUST BE FOR SUM OF MONEY CERTAIN IN AMOUNT: Note to *Wooley v. Sergeant*, 14 Am. Dec. 423; *Fralick v. Norton*, 55 Id. 56; *Averett's Adm'r v. Booker*, 76 Id. 203. The principal case was followed in *Johnson v. Frisbie*, 15 Mich. 291, on the point that a note otherwise negotiable was still such, although payable "with current rate of exchange on New York;" but the opposite conclusion was reached in *Lowe v. Bliss*, 76 Am. Dec. 742.

IN THE MATTER OF LANTIS.

[9 MICHIGAN, 324.]

WRIT OF CERTIORARI IS NOT ONE OF RIGHT at the common law, but rests in the sound discretion of the court, to be allowed or not, as may best promote the ends of justice; and statutory provisions requiring the writ to be issued within a certain time, and providing for its allowance out of court, do not take away the court's discretionary power.

WRIT OF CERTIORARI QUASHED FOR LACHES OF PARTIES in not suing it out sooner.

CERTIORARI. Proceedings had been taken under the act of 1857, "to provide for the draining of swamps, marshes, and other low lands," and the report of the commissioners was filed in the Jackson circuit court, and confirmed on September 26, 1859. Lantis and others appeared in court and opposed the confirmation of the report. On August 23, 1860, they sued out a writ of *certiorari* to remove the proceedings to the supreme court. A motion to quash the writ was thereupon made.

Blair and Gibson, for the motion.

Gridley and Conely, contra.

By Court, MANNING, J. The motion to quash the writ must be granted. No *certiorari* is given by the statute authorizing the proceedings of the commissioners, and at common law the writ is not one of right, but rests in the sound discretion of the court, to be allowed or not, as may best promote the ends of justice: *People v. Supervisors of Allegany*, 15 Wend.

198; S. C., 2 Hill (N. Y.), 9. The report of the commissioners was confirmed on the twenty-sixth of September, 1859, and the writ was not sued out by the relators until the twenty-third of August, 1860, eleven months thereafter. They appeared and opposed the confirmation of the report in the circuit court, and if they intended, after failing there, to bring the case to this court for review, they should not, in justice to the commissioners, the contractors, and tax collectors, have lain by until the work was done and the taxes were levied and collected, as under the law and in the natural course of events they would be, and we are bound to suppose were, before appealing to this court for relief. They should not, by this apparent acquiescence on their part for so long a time in the action of the circuit court, be permitted to reap, as its fruit, the benefit of what was afterwards done, without contributing towards the expense. *Non constat* that the contractors would have proceeded with the work, or that the taxes would have been levied and collected before the legality of the proceedings had been tested, had the writ been sued out within a reasonable time after the confirmation of the commissioners' report. For these reasons, without intending to lay down any general rule further than what is necessary to dispose of the present motion, we think the writ was improvidently allowed, on account of the laches of the relator in not suing it out at an earlier day, and that it should, for that cause, now be quashed.

The statutory provisions requiring the writ to be issued within two years, and providing for its allowance out of court, were not intended to and do not take away the discretionary power of the court. The first is a limitation on its powers; and the other provision was only intended to do away with the necessity of a special application to the court for the writ, which would have to be made when the court was in session, and could be made at no other time.

In the case of *People v. Supervisors of Allegany*, 15 Wend. 198, and in *State v. Anderson*, 1 Coxe, 318 [1 Am. Dec. 207], the writ was quashed on the argument of the case, although it had been allowed by the court. The court, being then in possession of the whole case, can more satisfactorily exercise its discretion than on the *ex parte* statement made to procure the writ.

The writ must be quashed, with costs of the motion.

MARTIN, C. J., and CHRISTIANCY, J., concurred.

CAMPBELL, J., delivered a dissenting opinion.

CERTIORARI IS NOT WRIT OF RIGHT, BUT IS DISCRETIONARY WRIT: *Duggen v. McGruder*, 12 Am. Dec. 527, and note. It should, therefore, not be allowed where the equities are against it: *People ex rel. Roediger v. Drain Commissioners*, 40 Mich. 746; and where it appears that substantial justice was done by the action of taxing officers, which it is sought to reverse, the writ will be denied or quashed: *Knapp v. Heller*, 32 Wis. 470.

CERTIORARI, NOT GRANTED, BUT QUASHED, FOR LACHES: *Duggen v. McGruder*, 12 Am. Dec. 527, and note. The principal case was not followed in *Wilson v. Gifford*, 42 Mich. 456, in a case involving delay in suing out the writ.

CRANE v. DWYER.

[9 MICHIGAN, 350.]

EQUITY WILL NOT LEND ITS AID TO ENFORCE FORFEITURE by granting an injunction to prevent a vendee from removing a house erected by him upon the land, where the vendor declared the contract forfeited, according to its terms, for the non-payment of an installment of the purchase-money.

BILL for an injunction. One Charles Dwyer entered into a contract with the complainant, Albert Crane, for the purchase of a lot of land in the city of Detroit, the purchase price to be paid in installments. The contract provided that, in case of default by the vendee, his heirs, executors, administrators, or assigns, the vendor might declare the contract void. Dwyer went into possession of the lot, and erected a dwelling-house thereon at a small expense. He afterwards assigned the contract to one Dunroe, who in turn assigned it to Dwyer's wife. Default having been made in the payment of installments of the purchase price, the complainant put an end to the contract, and instituted proceedings to recover possession of the premises. While these proceedings were pending, the defendants commenced to remove the house. The complainant asked for an injunction to restrain the removal, which was granted, but afterwards dissolved, and the bill dismissed.

D. C. Holbrook, for the appellant.

Maynard and Meddaugh, and G. V. N. Lothrop, for the defendants.

By Court, MANNING, J. Equity will not lend itself to enforce a penalty or forfeiture, as it would do in giving the relief asked. The case made by the bill is a forfeiture by one of defendants of all her rights in a contract made with complainant for the purchase of a lot of ground in the city of Detroit.

and assigned to her. The house in question was built by the purchaser after he took possession of the lot: and complainant, having put an end to the contract for the non-payment of a part of the purchase-money at the time stipulated, as by the terms of it he had a right to do, claims the house under the forfeiture, and asks an injunction to prevent its removal. The decree dismissing the bill must be affirmed.

The other justices concurred.

FORFEITURES ARE NOT FAVORED EITHER AT LAW OR IN EQUITY: *Lyon v. Travelers Ins. Co.*, 55 Mich. 146, citing the principal case; and see *Dunklee v. Adams*, 50 Am. Dec. 44.

FARR v. RASCO.

[9 MICHIGAN, 353.]

EVIDENCE THAT SIMILAR REPORTS WERE PREVIOUSLY IN CIRCULATION CONCERNING PLAINTIFF ARE ADMISSIBLE in mitigation of damages in an action for slander.

ACTION for slander. Plea, the general issue. The plaintiff proved the publication of the slanderous words, and the defendant then sought to show, in mitigation of damages, that previous to such publication reports to the same effect were in common circulation in the vicinity where the plaintiff resided, but the court refused to admit the evidence. The plaintiff had a verdict, and the defendant brought error.

M. L. Drake, for the plaintiff in error.

Crofoot and Dewey, for the defendant in error.

By Court, MANNING, J. It would be useless to attempt to reconcile the numerous conflicting cases cited and commented on by counsel on the argument. In such circumstances, the court must be governed in the conclusion it may come to more by legal principles than by reported cases, which frequently are but evidence of the application of such principles to a particular state of facts. It sometimes happens that evidence which is admissible for one purpose is wholly inadmissible for another and different purpose. In such cases, to reject the evidence entirely might work as great injury to the party offering it as its admission could possibly do to the opposite party. To obviate this difficulty as far as practicable, the evidence is admitted, with instructions to the jury to use it for

a particular purpose, and that only, and not for all the purposes of the suit. Once before the jury, it may, notwithstanding the instructions of the court, have more or less weight with them on other parts of the case. Of the two evils, the rejection of the evidence entirely, or its admission for a particular purpose, with instructions to the jury to disregard it for any and all other purposes, the latter is supposed to be least objectionable, and therefore has been adopted by courts as the rule in all such cases. Now, we cannot but think the great contrariety of decisions on the question before us has arisen, in part, from overlooking this rule, and in part from inadvertence to the two distinct elements that enter into and form the basis for damages in this class of cases. The fair reputation of the person slandered, and the *quo animo* of the slanderer, are, we believe, admitted by all of the cases to be taken into consideration by the jury in assessing the damages. But in some of the reported cases where the defendant, to disprove a malicious intent, has offered to show what he said was public rumor, and was spoken of by him as such, or had been told to him by another whose name he mentioned at the time, the evidence has been rejected on one or both of the following grounds, viz.: 1. That it did not prove the truth of the words uttered; or 2. That to admit it would be allowing the slander to be given in evidence to asperse the plaintiff's reputation, and to the extent of the injury it had done his reputation, to lessen his claim for damages. Both reasons are fallacious, as the evidence is not offered for either of those purposes, but to show the *quo animo* of the defendant—whether in uttering the words spoken by him he was prompted by feelings of hostility to the plaintiff, or by a gossiping tongue, or by nothing more than the common inclination prevalent among friends and associates when together to speak of the news of the day.

Not to admit the evidence would be placing one who should read a slanderous article from a newspaper in the presence and hearing of others on a level with the author of the slander. The law is too discriminating in meting out justice to lay itself open to the charge of so gross a blunder. It is said the slanderer may secretly rejoice within himself at the slanderous rumor, or at the defamatory tale that has been told him, and use it as a cloak to conceal the stiletto with which he stabs the reputation of another; or that he may have been the author of the rumor he asks the law to interpose as a shield between him and his adversary when called on to account for

his conduct. This is one extreme; the other may be found in the case already mentioned of reading from a newspaper. Shall both be mulcted in the same amount of damages? Is the *quo animo* the same? Does the law make no distinction between them? And between these extremes every variety of cases may be found, filling up the intervening space. To enable the jury to do justice in each, the facts attending and surrounding each must be permitted to go before them, with instructions from the court to take them into consideration in assessing plaintiff's damages, but for no other purpose.

The judgment must be reversed.

CHRISTIANCY and CAMPBELL, JJ., concurred.

MARTIN, C. J., was absent.

REPETITION OF DEFAMATORY WORDS RENDERS ONE LIABLE THEREFOR: *Kenney v. McLaughlin*, 66 Am. Dec. 345, and note collecting prior cases; *Sheahan v. Collins*, 71 Id. 271; *Terwilliger v. Wands*, 72 Id. 420.

EVIDENCE OF CIRCULATION OF PRIOR REPORTS OF SIMILAR NATURE, whether admissible in mitigation of damages in action for slander, see *Sanders v. Johnson*, 36 Am. Dec. 564, and note collecting prior cases; *Wetherbee v. Marsh*, 51 Id. 244; and see *Sheahan v. Collins*, 71 Id. 271.

WANT OF MALICE MAY BE SHOWN IN MITIGATION OF DAMAGES in an action for slander: *Huson v. Dale*, 19 Mich. 37; *Welch v. Ware*, 32 Id. 86; *Maclean v. Scripps*, 52 Id. 244, per Sherwood, J., dissenting, all citing the principal case.

BONESTEEL v. TODD.

[19 MICHIGAN, 371.]

JUDGMENT UNDER JOINT DEBTOR ACTS DOES NOT EXTINGUISH ORIGINAL DEMAND, when it is in form against two joint debtors, but only one was served with process.

COVENANT. The facts are stated in the opinion.

L. D. Norris, for the plaintiff in error.

H. J. Beakes, for the defendant in error.

By Court, CAMPBELL, J. Plaintiff sued defendants upon a joint indebtedness—Todd only being served with process. He set up in bar that plaintiff had recovered a judgment in New York on the same claim. The judgment relied on was rendered in that state in form against both defendants, but upon personal service against Jacox alone.

The questions which are presented relate: 1. To the effect

of such a judgment upon the original demand when set up in this state; and 2. To the sufficiency of the evidence to establish such a judgment.

It is claimed on behalf of the defendants that the New York judgment extinguished the original demand entirely, and that plaintiff was thereafter either entirely without remedy, or confined to a suit or other proceeding upon that judgment.

It was decided in *Candee v. Clark*, 2 Mich. 255, that a judgment against one joint debtor operated as a merger, and put an end to any action on the original contract against either. This decision was in accordance with an unbroken line of decisions at the common law, whereby a party electing to take a higher security, and thereby put an end to the liability of one debtor upon the contract, deprived himself of any further claim against the other by destroying the only joint demand. A party must always take such consequences as the law annexes to his election of remedies. And such were the consequences at common law where a sole judgment was obtained on a joint demand. The reasons are perhaps not as satisfactory as they might be, but the law was clear. There was nothing before the court in *Candee v. Clark*, 2 Mich. 255, to affect the common-law rule.

While, however, at the common law such was the effect given to a common-law judgment rendered in England, yet no such consequences attended a foreign judgment. A party might sue upon his original cause of action, or he might bring *assumpsit* upon the foreign judgment, which was regarded as mere evidence whereon to base a demand, and of no higher character than a simple contract: *Hall v. Odber*, 11 East, 118; *Smith v. Nicolls*, 5 Bing. N. C. 208.

Were it not for the constitution of the United States, the judgments of sister states would be left on the footing of foreign judgments; and until the case of *Mills v. Duryee*, 7 Cranch, 483, was decided, they were very frequently, if not generally, regarded as open to the same investigation, and as not operating to merge the debt or demand sued upon: *Bartlet v. Knight*, 1 Mass. 401 [2 Am. Dec. 36]; *Hitchcock v. Aicken*, 1 Cai. 460; *Taylor v. Bryden*, 8 Johns. 173; *Pawling v. Wilson*, 13 Id. 132. But under the constitution and laws of the United States, the judgment of one state is to have the same credit in another state as it has by law or usage in the courts of the state where it is rendered.

As the judgment rendered in New York against the defend-

ants impleaded before us was without any service of process against Todd, and he never appeared in the suit, it can have no binding force upon him personally. This is a principle of universal justice, and has been directly applied to a similar judgment rendered in New York, and sued upon in Louisiana, in the case of *D'Arcy v. Ketchum*, 11 How. 165. And the court of appeals of New York has decided expressly that no claim can be averred against defendants jointly as arising out of such a judgment, because it has no validity as a personal judgment against the party not served and not appearing: *Oakley v. Aspinwall*, 4 N. Y. 514; S. C., 13 Id. 500.

The question then arises whether, notwithstanding the insufficiency of such a judgment to create a personal liability against one of the defendants, its effect is to put an end to the original contract. No one can question the power of any state to regulate the forms of remedy in its own way against those who are personally served within its jurisdiction. And should a state impose upon a party suing in its courts upon a simple contract the extinguishment of that contract by a judgment which should not bind all of his debtors, we are not prepared to say that such a consequence could not be lawful. But if the laws of New York have imposed no such conditions upon parties suing under their joint debtor acts, we should be giving their judgments more than their domestic force were we to impose them. This is very clearly explained in the case of *Suydam v. Barber*, 18 N. Y. 468 [75 Am. Dec. 254]. In that case a suit was brought in New York on an original demand against several defendants, and it was set up in bar that a sole action had been brought, and a sole judgment been obtained against one of them in Missouri, whereby it was claimed the debt was merged. It appeared, however, that the law of Missouri provided that actions might be brought against any one or more of joint debtors, and that their obligation should be regarded as joint and several. Upon this, the defense was held invalid. The court say: "According to the common law of this state, a judgment against one of several joint debtors, obtained in an action against him alone, is a bar to an action against the others: *Robertson v. Smith*, 18 Johns. 459 [9 Am. Dec. 227]; *Pierce v. Kearney*, 5 Hill, 82; *Olmstead v. Webster*, 8 N. Y. 413. It is held to be a bar, upon the ground that by the recovery of the judgment the promise or cause of action as to the party sued has been merged and extinguished in the judgment, 'by operation of law, at the instance and by the act of the creditor.' This is plainly founded upon the nature and force of a judg-

ment under our law, and not upon the idea that the creditor is deprived of his right for any other reason than that by the first suit and judgment he has placed himself in a position where he is unable legally to assert or enforce his demand. We can easily conceive that the legislature might alter this rule, and enact that a judgment against one of several debtors should have no such effect. Such a law would be a mere modification of the remedy afforded by our own legal process, and would be within the legislative authority of the state. These observations are made as showing that the consequences of a judgment, in respect to its effect as a merger or extinguishment of the original demand, are a part of the law under which the judgment itself is rendered, just as much as are those other common consequences of judgments, that a party may have execution upon them, and that they are not re-examinable on the merits of the controversy determined by them. In all these particulars, the effect of a judgment, in the government where it is rendered, is the subject of positive regulation by that government, just as it is the subject of positive regulation by what process and what courts judgment shall be rendered at all:" *Suydam v. Barber*, 18 N. Y. 470, 471 [75 Am. Dec. 254]. In thus holding, the court recognize the propriety of former decisions, where, as in *Candee v. Clark*, 2 Mich. 255, in our own state, the common-law presumption has been applied to foreign judgments in the absence of any proof of its abrogation.

We are of opinion that neither the analogies of the common law, nor the reasons on which the rule is based, can apply to the statutory proceedings in question, and we think the decisions of the New York courts confirm this view.

In commencing this action, the plaintiff, instead of manifesting a desire to look to a single defendant, sues them all. The judgment runs personally against one, but it is in form against both, and but for the want of power to reach the absentee, would be valid in every respect against both. Instead of being estopped from any further joint claim by entering it, the plaintiff is entitled, at any time, to bring in the remaining party by *scire facias*, whenever he can be found in the jurisdiction; and try the case over again as to him. In doing so, he is obliged to resort to proof of the original demand; and his existing judgment cannot avail him: N. Y. Code, secs. 136, 375, 379.

The common-law rule discharged the debtor who was not bound by the judgment from all further liability in any shape.

But under all the New York joint debtor acts, it has been held that the judgment was no bar to a further action. Their revised statutes, from which ours were, in this respect, borrowed, referred very plainly to such actions, and provided how far the judgment should be allowed to prevail as evidence. The only dispute has been whether such new action should be in form on the judgment or on the original demand. But the original demand was always to be made the real foundation of a recovery against the defendant not served in the former action: See *Mervin v. Kumbel*, 23 Wend. 293; *Bruen v. Bokee*, 4 Denio, 56 [47 Am. Dec. 239]. In *Oakley v. Aspinwall*, 4 N. Y. 514, six out of the eight judges of the court of appeals held that no joint liability could be regarded as arising out of such a judgment. Jewett, J., who concurred in this opinion, held that the legislature having full power to determine in what form a remedy should be sought, the statute might permit an action upon the original demand to be in form upon the judgment, as more convenient, although anomalous. Bronson and Mullett, JJ., thought the judgment should not be regarded as a ground of joint action. But no one has ever doubted the continuing liability of all parties. We cannot, therefore, regard the liability as extinguished. And inasmuch as the new action must be based upon the original claim, while, as in the case of foreign judgments at common law, it may be of no great importance whether the action may be brought in form upon the judgment or on the primary debt, it is certainly more in harmony with our practice to resort to the form of action appropriate to the real demand in controversy. While we do not decide an action in form on the judgment to be inadmissible, we think the action on the contract the better remedy to be pursued.

As we do not regard the New York judgment as a bar to the action before us, it is not necessary to examine the questions arising on the transcript of the judgment.

The judgment of the circuit court must be reversed, and a new trial granted.

The other justices concurred.

MERGER OF DEBT BY RECOVERY AGAINST ONE JOINT DEBTOR: See *Seydau v. Barber*, 75 Am. Dec. 254, and note collecting prior cases. A judgment under the joint debtor acts, though joint in form, is not a joint obligation binding both defendants alike, if only one is served, and it does not merge the debt so as to preclude suing both over again: *Holcomb v. Tift*, 54 Mich. 648; *Goebel v. Stevenson*, 35 Id. 185; *Mason v. Eldred*, 6 Wall. 239, all citing the principal case.

CASES
IN THE
HIGH COURT OF ERRORS AND
APPEALS
OF
MISSISSIPPI.

HARREL v. STATE.

[89 MISSISSIPPI, 702.]

ACCESSARY AFTER FACT is ONE who aids, etc., another, after he has fully completed a felony.

AIDING GUILTY PARTY TO ESCAPE after he has given another a mortal wound, but before death ensues, does not make the person giving such aid an accessory after the fact.

CRIME of murder is not consummated until the death of the victim.

Myers, Lowry, and W. B. Shelby, for the plaintiff in error.

T. J. Wharton, attorney-general, for the state.

By Court, SMITH, C. J. This was a conviction in the circuit court of Rankin county, under the statute defining the crime of being an accessory after the fact, and prescribing the punishment therefor: R. C., 573, sec. 2, art. 3.

The exceptions to the judgment are based upon errors alleged to have been committed by the court in charging the jury.

The indictment under which the plaintiff in error was tried alleged: 1. That one Richard Harrel had (setting out the circumstances of the transaction) feloniously, willfully, and with malice aforethought "killed and murdered" one Telfair Harrel; and 2. That the plaintiff in error, well knowing the said Richard Harrel, "had done and committed the said felony and murder in form aforesaid," had afterwards aided and

assisted said Richard with the intent to enable him to escape and evade arrest, etc.

The evidence adduced on the trial rendered it highly probable, if not certain, that the aid and assistance which were proved to have been given by the plaintiff in error, with the intent to enable Richard Harrel to effect his escape, were, in point of fact, given after the mortal blow was dealt, but before the death of the party whose life had been assailed; but which occurred within a very short time thereafter.

Upon this state of evidence, the court, at the instance of the prosecuting attorney, charged that "if the jury believed from the evidence that after Richard Harrel had inflicted a mortal wound on Telfair Harrel, and when said Telfair Harrel was in a dying condition, the defendant aided and assisted the said Richard to escape by furnishing him with a horse and money, and sending him away, knowing that said Richard had so wounded the said Telfair Harrel, and with a view to enable him to avoid arrest, they should find the defendant guilty."

And refused to charge, at the instance of the defendant that if the jury believe from the evidence that William Harrel helped the said Richard off before the said Telfair died they should find the defendant not guilty.

It is clear that the felony charged in the indictment to have been committed by the said Richard Harrel was the murder of Telfair Harrel, and not an assault and battery upon him with intent to commit murder. It is therefore certain that until Telfair Harrel died, the felony alleged in the indictment, and in respect to which the plaintiff in error was charged as accessory after the fact, was not consummated.

In order to fix the guilt of a party charged as accessory after the fact, it is essential that the alleged felony should be complete. Until such felony has been consummated, any aid or assistance rendered to a party in order to enable him to escape the consequences of his crime will not make the person affording such assistance guilty as an accessory after the fact. This is the rule recognized, without exception, by all the authorities: 1 Hale P. C. 622; 2 Hawk. P. C., c. 29, sec. 35; 4 Bla. Com. 38; 3 Greenl. Ev. 47; Roscoe's Crim. Ev. 219, 220.

It is clear, therefore, that the court erred in giving the instruction requested in behalf of the prosecution, and in refusing that asked for by the defense.

As we reverse for this error, we deem it unnecessary to notice another exception taken to the ruling of the court.

Judgment reversed, and cause remanded for new trial.

ACCESSARIES AFTER FACT.—An accessory after the fact is, by the common law, one who, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon, or in any manner aids him to escape arrest: Wharton on Crim. L., sec. 241, and note. Several things must be combined in order to constitute an accessory after the fact: 1. There must have been a felony committed; 2. The felony must be complete: *Id.*, sec. 242, and note, where the principal case is cited; 3. The person rendering aid, etc., must know of the felony, and that the person aided is the guilty party. This fact must be alleged in the indictment: *Id.*, and notes 10 and 11. Under a statute making it an offense to knowingly harbor or relieve one who has committed an offense, there must be a knowledge that the offense has been committed and an intent to shield the guilty party from the law. An indictment which does not charge such knowledge is bad: *State v. Davis*, 14 R. I. 281. An accessory after the fact cannot be convicted under an indictment as a principal: *People v. Campbell*, 40 Cal. 129. Mere silence, or approval of the commission of an act after it is done, does not constitute one an accessory: *People v. Johnson*, 81 Mo. 483. Under the common law, the principal felon must first be convicted of the felony before an accessory can be found guilty: *Buck v. Commonwealth*, 107 Pa. St. 486. He could be indicted jointly with the principal. The conviction of the principal was *prima facie* evidence of his guilt, and the burden of proof at the trial of the accessory was thrown upon defendant by the judgment of conviction of the principal. It was necessary for him to show that the latter ought not to have been convicted, and in proving this, he might establish any fact which would show this, or tend to do so: *State v. Crank*, 23 Am. Dec. 117; *State v. Sims*, *Id.* 29; *Commonwealth v. Knapp*, 10 Pick. 484.

If a defendant has done no act which would make him responsible for a murder, the fact that he aided in concealing the dead body would render him liable only as an accessory after the fact. For such offense, he could not be found guilty as a principal under an indictment for murder: *People v. Keeper*, 2 West Coast Rep. 878. It is necessary to show the guilt of the principal felon before a conviction of the accessory can be had: *Buck v. Commonwealth*, 107 Pa. St. 486.

This rule was found to thwart the ends of justice so frequently that many of the American states have by statutes enacted that the conviction of the principal need not be had in order to convict the accessory, but the rule that the guilt of the principal must be shown in order to convict the accessory has not been changed. This may be shown by parol: *State v. Crank*, 23 Am. Dec. 117. It has been held to be unnecessary to allege in an indictment that the principal had been convicted: *Id.* Many of the United States have enacted laws providing that the several acts, which at common law constituted the crime of accessory after the fact, shall constitute an independent offense.

McWHORTER v. DONALD.

[39 MISSISSIPPI, 779.]

PROBATE OF CLAIMS AGAINST DECEDENT must be made upon the affidavit of the creditor in the form prescribed by law, otherwise it will be void, and will not be a sufficient voucher for its payment.

PARTY WHO PAYS DEBT OF DECEDENT IN HIS LIFE-TIME cannot probate the amount so paid in an account in his own favor by his own affidavit merely, but must show by other proof that such payment was made at

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the request of decedent. He ought to have the affidavit of the original creditor showing the debt to be just and true.

CREDITOR'S OWN AFFIDAVIT TO HIS CLAIM AGAINST ESTATE OF DECEDENT IS ESSENTIAL TO ITS ALLOWANCE. An affidavit made by others is not sufficient, even though the affiant be the husband of claimant.

AFFIDAVIT OF CREDITOR OF INTESTATE must not only state, to establish his claim, that it is just and true, but also that it is not paid, and that no security, or satisfaction or security, has been received therefor.

THE vouchers mentioned in the opinion are in the following form. No. 3 is an open account in favor of the administrator against the intestate, which had been probated upon his making the ordinary creditor's affidavit prescribed by statute. These items appear among others:

May 15, 1857.	Amount paid Drs. Galloway and Red, bill	\$15 00
April 8, 1858.	Amount paid Dr. Lewis, bill	10 00
April 8, 1858.	Amount paid Dr. Shrock, bill	5 00
April 8, 1858.	Amount paid Dr. Lloyd, bill	20 75
Jan. 10, 1859.	Amount paid Dr. J. M. Burnett, bill,	3 50

No proof was offered to show that these payments had been made at the request of the intestate. No. 4 was in every respect similar to No. 3, and contained these items:

Sept. 22, 1859.	Bill of burying clothes	\$24 53
Sept. 22, 1859.	Funeral expenses	25 00

No. 6 was similar in every respect to No. 3. No. 5 was an account in favor of Mrs. Donald, the wife of the administrator, against intestate for five hundred dollars for services rendered him and his wife for three years during their last illness. This account was probated upon the affidavit prescribed by law, except that it was not signed or sworn to by Mrs. Donald, but was signed and sworn to by John T. Donald, the administrator, Edward Davis, and Owen Sanders. No. 10 was an account in favor of one Zollikoffer. The affidavit only stated that the account "was just and true." It did not state that no part of it had been paid, nor any security or satisfaction received therefor. As to the negroes mentioned in the opinion, there is no legal point involved; it is not therefore necessary to state the facts any clearer than they are stated in the opinion in reference to that item. The opinion states the other facts.

R. Reid, for the appellant.

J. D. Eades, for the appellee.

By Court, HARRIS, J. The appellant filed her petition in the probate court of Leake county against the appellee as ad-

ministrator of John Adams, deceased, for a final settlement of said estate. An account was filed and excepted to; and the judgment of the court overruling appellant's exception, allowing the account as filed, and discharging the administrator, is the ground of error now assigned.

We shall only notice the grounds of exception which are well taken, and which should have been sustained.

The fourth ground of exception refers to voucher No. 3, which embraces a number of accounts and items (against decedent) paid by John T. Donald in his life-time. The only proof of these accounts appearing in the record is a statement of the amount of each and when paid, and the oath of the administrator that his account thus made out is just and true, and no part thereof has been paid or any security or satisfaction given for the same. It nowhere appears that these items or accounts were paid for by said Donald at the request of the said Adams, or that said Adams in any manner directly became the debtor of the said Donald, or recognized the validity of said debts against him, or the propriety of their payment for him by said Donald. The said Donald, therefore, by the payment of these accounts, only became the equitable transferee, and as against the estate of decedent is compelled to present each account itself, with every item, with the oath of the creditor, as required by the code, indorsed thereon, with such proof as will satisfy the court that the account is just and true, and has not been secured or satisfied. To allow an assignee of an open account to pay the same, make a new account for money paid, and then by his own oath to probate his account as "just and true," etc., in the terms of the statute, would be to annul the statute requiring strict proof of accounts against the estates of decedents, and open a wide door to the grossest frauds.

Exception No. 5 to voucher No. 4 presents the same question, and was also well taken.

Exception No. 6 to voucher No. 5 presents two questions: 1. As to the form of probate; and 2. As to the validity of the claim under the proof in this record; and on both points the exception was well taken.

If the account was due to Mrs. Eliza M. Donald, the statute requires that she should probate it in the usual form, which is not done; she does not appear to have had any active agency in this transaction, and may be to this day wholly ignorant that she is made to charge her deceased mother and step-

father for services she voluntarily rendered them in their dying moments. For this very reason, among others, the statute requires the account itself, with the oath of the creditor indorsed thereon. It may be, and is even quite probable from her filial attention to her aged parents in their last moments, that no temptation could have seduced her to swear that this account of five hundred dollars against the estate of John Adams is "just and true;" and if the claimant of the account as it appears in the record does not so swear, or will not so swear, the statute intends that outsiders shall not volunteer to do it for her.

On the second question presented by this exception, it is clear from the proof in the cause that this claim is without the shadow of foundation. It neither rests on contract nor finds the least sanction in any code of morals. It is unconscionable, and should not therefore be tolerated in a court of justice having power to reject it.

Exception No. 7 to voucher No. 6, and exception No. 9 to voucher No. 10, are both well taken; the first for the reasons stated on the fourth exception, and the last because Zollikoffer does not show in his verification that no part of the money stated to be due, nor any security or satisfaction for the same, has been received, etc., as required by the statute.

The refusal of the court to require the administrator to charge himself with the hire of certain negroes, stated in the proof to have belonged to or been in the possession of Adams in his life-time, and used by Donald on his farm for several years before the death of Adams and even after his death, was clearly error, as the case is presented by the proofs in this record.

Let the decree be reversed, and cause remanded for a final account and settlement, and other proceedings in accordance with this opinion.

THE PRINCIPAL CASE IS CITED AND EXPLAINED in *Donald v. McWhorter*, 40 Miss. 232, with reference to the accounts or claims against the estate of Adams, deceased. On a retrial of this case, the court below excluded all evidence as to the validity and fairness of the accounts, and finally concluded the administrator Donald from establishing their validity. This, the court say in the case above mentioned, it should not have done. It was also held in said case, and in the same case on another appeal, 44 Id. 131, that in order to sustain the claim of Mrs. Adams, mentioned in the opinion of the principal case, there must have been a promise to pay for her services. She was a relative, and no promise could be presumed by the fact that she performed services for deceased as a nurse.

CANNON v. COOPER.

[39 MISSISSIPPI, 734.]

JUDGMENTS ARE PRESUMED TO BE FOUNDED on proper and sufficient evidence, and they cannot be collaterally impeached, no matter how insufficient the evidence may in fact have been.

WHEN ACTION IS REVIVED IN HIGH COURT OF ERRORS against an administrator, he becomes a party to it for all purposes, and if it is remanded to a lower court, he is a party to said action in such lower court. It is unnecessary, in such case, for the lower court to enter any further order of revival against him.

NUL TIEL RECORD IS INSUFFICIENTLY PLEADED, where the allegation is, in substance, that if there be a record of any such supposed judgment, the defendants were not made parties to the suit in which it was rendered, because it does not conclude with a verification by the record. A demurrer to such a plea ought to be sustained.

IT IS NOT DEFENSE TO ALLEGATION charging an administrator with waste, etc., to deny that the administrator had not wasted or misapplied the assets as alleged. He must show some good reason why he did not do what appears by the declaration to be his duty.

THE facts are sufficiently stated in the opinion.

W. P. Harris, for the plaintiff in error.

D. Shelton, for the defendants in error.

By Court, HANDY, J. This was an action on the bond of the defendants in error, as administrators of John Martin, deceased, brought by the plaintiff in error, a judgment creditor, for a *devastavit*.

The declaration contains the usual averments of the rendition of a judgment in behalf of the plaintiff in error against the administrators; of assets in their hands before and after the rendition of the judgment sufficient to pay it; and their failure to pay it.

To this, the defendants pleaded several pleas, to all of which the plaintiffs demurred, except one. The demurrer was overruled as to two of these pleas; and the issue of *nul tiel* record as to the judgment upon which the plaintiffs' claim was founded was adjudged for the defendants, and a final judgment was thereupon rendered for them.

This judgment and the rulings of the court on the demurrers to two of the pleas present the questions for our consideration.

The first question which we will consider is the action of the court upon the plea of *nul tiel* record.

On the trial of this issue, the plaintiff offered in evidence the transcript of the record of a judgment in the Lawrence county circuit court, showing the following state of case: The

suit was instituted by Matthew B. Cannon against William A. Stone, administrator of John Martin, and a judgment rendered for the plaintiff, which was reversed, and a new trial awarded on writ of error by this court. When the case went back to the court below, Stone filed pleas setting up a revocation of his letters of administration with the will annexed; and thereupon, on suggestion of such revocation, and that letters of administration *de bonis non* had since been granted to him, a *scire facias* was awarded against him in the latter capacity and issued; to which he filed a demurrer, which was sustained, and judgment rendered thereon for the defendant. This judgment was reversed on writ of error by this court; and the transcript shows the mandate from this court to the court below remanding the cause, and stating the style of the cause as follows: "James M. Cannon, administrator of M. B. Cannon, deceased, plaintiff in error, v. Eliza J. Martin and T. T. Cooper, administrator and administratrix, etc., defendants."

The transcript then shows the style of the cause in the court below, subsequent to this mandate, the same as stated in the mandate, and it shows an order in substance as follows: That the plaintiff appeared by attorney, "and it appearing to the satisfaction of the court that the cause had been duly and properly revived on the motion of said plaintiff against said Eliza J. Martin and Timothy T. Cooper, administrators, etc., of John Martin, deceased, in the high court of errors and appeals, and by the order thereof, and that said administrators had thereby due notice of the pending of this cause in said circuit court—it was thereupon ordered that the cause be revived in said circuit court against them; and as they had filed no new plea to the action, that it should stand for trial on the issue theretofore filed," etc. The cause was then tried, and judgment on verdict was rendered for the plaintiff.

The defendants objected to the introduction of this transcript, because: 1. The transcript showed no revival of the action against them in the circuit court, nor notice to them of its pendency; 2. It did not show any such revival or notice in the high court of errors and appeals. This objection was sustained, and the transcript excluded, and judgment was thereupon rendered for the defendants on the plea of *nul tiel* record.

It will be observed that the transcript positively shows that it appeared to the satisfaction of the court that the suit had been duly revived in this court against these administrators. It does not state the evidence by which the recited fact was made to appear to the court. Nor was it necessary that it

should do so. The evidence upon which orders and judgments of courts of general jurisdiction are founded is not necessarily a part of the record, nor required to be shown by it. The presumption of law is, that such judgments are founded on proper and sufficient evidence; and in the absence of the statement of the evidence, if it appear that the fact in question was adjudicated upon evidence deemed sufficient by the court, upon well-settled principles, the judgment cannot be collaterally impeached, however insufficient the evidence may have been in fact: *Cason v. Cason*, 31 Miss. 578.

Hence it must be taken as a matter concluded by the transcript offered, that the revival took place in this court; and the only question is, whether that was sufficient to dispense with a revival and process necessary thereto, in the circuit court.

The statute clearly allowed the representatives of deceased persons' estates to be made parties in the high court of errors and appeals to suits pending therein: Hutch. Code, 841, 842; Id. 929, sec. 25; and authorized final judgment to be rendered against them therein. When made parties, they must become so for all the purposes of the suit, whether the judgment be final in this court or the cause be remanded to the court below for further proceedings. If the cause be remanded, it is a mere continuation of it; and the parties to it, who were such in this court, would necessarily be the parties to it in all subsequent proceedings, unless some change was made in a way recognized by law. For having been regularly introduced as parties to it, it would be vain and useless to take other steps and incur further expense to make them such in its further progress.

But, in addition to this, the defendants were made parties by order of the court when the case was sent back to the court below, because it was shown to the court that the suit had been duly revived against them in this court. This was a useless step, except that it shows that it was taken upon evidence which was deemed sufficient, showing that the cause had been revived in this court.

We think it clear that the court erred in excluding the transcript, and in not rendering judgment for the plaintiff on the plea of *nul tiel* record.

The next assignment of error to be noticed is the overruling of the demurrer to the third plea. That plea is in substance as follows: That if there be a record of any such supposed judgment, the defendants were not made parties to the suit in

which it was rendered; wherefore they say that the court had not jurisdiction to render the said judgment against them.

This plea was manifestly insufficient. It is in substance an argumentative denial of the existence of the record of the alleged judgment, by averring that they were not made parties to it. If they were not made parties, and had not notice of the suit, there was no legal and valid judgment against them, and therefore the plea was in effect a plea of *nul tiel* record. But it is insufficient for that purpose, because it does not conclude with a verification by the record; and if it were allowable, the trial of the issue tendered by it would not have been confined to the record, but any evidence showing that they were not properly made parties might have been admitted, though it might have been in contradiction of the averments of the record. We have above seen that this cannot be done; and consequently the demurrer to the plea was improperly overruled.

The next error assigned is the overruling of the demurrer to the fifth plea. That plea does not appear to be relied on by the counsel of the defendants, who says nothing in support of it. It was clearly bad, being a mere allegation that the administrator Cooper had not wasted or misapplied the assets as alleged.

The declaration alleged in substance that the administrator had received assets sufficient to pay the plaintiffs' judgment, but that they failed to apply them to its payment. If this be true, it was their duty to pay the judgment, unless they could show some good reason for their failure. It was not sufficient that they did not waste or misapply the assets; for they might, consistently with that, have kept them idle in their own hands. But it was incumbent on them to show affirmatively the state of facts relied on as their justification for failing to do what appeared by the declaration to be their duty.

For these reasons, the judgment must be reversed, and the cause remanded for further proceedings.

JUDGMENT OF COURTS UPON MATTERS WHICH THEY HAD RIGHT TO DECIDE cannot be collaterally attacked. Whether the court had the proper evidence before it cannot be inquired into: *De Ford v. Furniss*, 43 Miss. 133, 151; and *Cocks v. Simmons*, 57 Id. 196, citing the principal case.

JUDGMENT OF COURT OF COMPETENT JURISDICTION is *prima facie* evidence of jurisdiction: *Wallace v. Brown*, 76 Am. Dec. 622, note 628. Judgment of a court having jurisdiction, both of the persons of the parties and subject-matter of the action, are conclusive: Id. 628, note. Such judgment is binding until reversed or set aside: *Reynolds v. Harris*, 76 Id. 459, note 468.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

DRISKELL v. MATEER.

[81 MISSOURI, 825.]

SURETY IS NOT RELEASED BY ANY ACT or conduct of the payee which does not place surety in worse position than he would otherwise have been.

ESTOPPEL IS NOT CREATED BY ADMISSIONS which are not acted upon, and are not such as would produce injury to the party to whom they are made.

SURETY IS NOT RELEASED BY CREDITORS DECLARING TO HIM THAT DEBT IS PAID, if such surety does not in consequence change his situation or otherwise suffer loss.

THE facts are stated in the opinion.

Boulware and Gardenhire, for the plaintiffs in error.

By Court, EWING, J. This was an action on a note for one hundred dollars, executed to Driskell by Mateer as principal and Jones as surety.

The evidence was that the plaintiff Driskell told a witness that he had given the note to the principal; that it had been filed with a justice of the peace, who issued summons to the defendants, and a few days thereafter the plaintiff dismissed the suit, paid the costs and took the note, and stated that he intended to give the note to the principal; that the plaintiff told Jones (the surety) that he was relieved from all liability on said note; that upon Jones telling the plaintiff he wanted him to make the note off of Mateer, who was able to pay it, he (the plaintiff) replied that Jones need put himself to no further trouble respecting it; that he had made Mateer a present of it. It was also proved that after the note was

withdrawn from the justice, it was by request of the plaintiff demanded of Mateer, who delivered it up, remarking that he owed the debt and was sorry he had not been able to pay it, and it was returned to the plaintiff. It did not appear how or for what purpose the note got into the possession of Mateer, except as above stated.

The court instructed, on defendant's motion, that if Jones was surety on the note, and the note was delivered by Driskell to the principal, Mateer, and that Driskell at the time of the delivery intended to give and did give up the note to Mateer in discharge of the same, there should be a finding for the defendant. And on its own motion, that the mere fact that plaintiff stated to defendant Jones that he was released, and that he need not give himself any trouble about the note, as he had delivered the note to Mateer, is not a discharge and satisfaction of the note as to Jones.

It does not appear from anything in the bill of exceptions that the defendant was placed in a different or worse situation in consequence of the conduct or declarations of the plaintiff respecting the note; that he relinquished any indemnity or hold he may have had on his principal, or that he had or would sustain injury by reason of the maker's insolvency or otherwise. The admissions of a party to have the effect of an estoppel must have been acted on, and be such as would result in injury to the party acting upon them, if he should be allowed to disprove the truth of them: *Welland Canal Co. v. Hathaway*, 8 Wend. 483 [24 Am. Dec. 51]; see also opinion of Justice Bronson in *Dezell v. Odell*, 3 Hill (N. Y.), 215 [38 Am. Dec. 628]. When a creditor who knows that one debtor is a surety gives him notice that the debt is paid by the principal, and such debtor in consequence changes his situation, as by surrendering security or forbearing to obtain security when he might, or otherwise suffers loss by it, he is discharged: *Carpenter v. King*, 9 Met. 517 [43 Am. Dec. 405]. In this case, as well as that of *Harris v. Brooks*, 21 Pick. 195 [32 Am. Dec. 254], therein cited, the subsequent action of the surety in relinquishing or omitting to obtain security from the principal was treated as an essential point in any defense founded upon any assurance of exoneration given by the creditor; and that a mere assurance to the surety that he is exposed to no further liability for the debt will not protect him from a subsequent change of purpose on the part of the creditor, unless the conduct of the latter, when taken as a whole, can be shown

to have resulted in producing some pointed injury: See 2 Am. Lead. Cas. 175.

Judgment affirmed.

NAPTON, J., concurred.

SCOTT, J., absent.

GENERAL PRINCIPLES OF ESTOPPEL are stated in the case of *D. C. S. Aar's v. Sailor*, 63 Mo. 28, to be recognized in the principal case, which is there cited.

SURETY MAY BE RELEASED FROM LIABILITY by a binding extension of time given by the creditor to the debtor without the assent of the surety: *Lime Rock Bank v. Mallett*, 56 Am. Dec. 673; unless the surety is fully indemnified against loss by the principal debtor: *Smith v. Steele's Estate*, 60 Id. 276. Such release is not effected by mere indulgence not based on a valid and binding contract: *Burke v. Cruger*, 58 Cal. 102. A surety is, in general, released by any act of the creditor which tends to increase the surety's burden, as by varying the contract so as to increase the principal's liability, or by surrendering any collateral security for the payment of the debt: *Mayhew v. Boyd*, 59 Am. Dec. 101; *Cullum v. Emanuel*, 34 Id. 757; note to *Trapnall v. Richardson*, 58 Id. 358.

WHERE ONE WILLFULLY CAUSES ANOTHER to believe that a certain state of things exist, and he acts upon that belief so as to alter his previous condition, it constitutes an estoppel against the former if an assertion of the truth would cause the latter any loss: *Caldwell v. Auger*, 77 Am. Dec. 515, note 512.

PARTY IS NOT ESTOPPED by an act done in ignorance of his rights: *Thrall v. Lathrop*, 73 Am. Dec. 306.

WEST v. MARTIN.

[81 MISSOURI, 375.]

SURGEON IS ANSWERABLE TO HIS PATIENT FOR ERROR OF JUDGMENT so gross as to be inconsistent with the use of that degree of skill that it is the duty of every surgeon to bring to the treatment of a case.

NEGLECT OR IMPROPER CONDUCT OF PATIENT will not defeat his right of recovery against his physician for malpractice, unless it substantially contributes to the injury for which the patient seeks to recover.

ACTION for malpractice. The defendant, as surgeon, had been called to set plaintiff's broken leg. It was claimed that damages had accrued to plaintiff by reason of defendant's error of judgment and want of skill. The defendant offered to prove that the plaintiff and his family had weak bones, which were liable to break, and were difficult to cure. This testimony was excluded. A physician, examined on behalf of plaintiff, was asked whether, if the directions of a skillful surgeon had been followed in the treatment of the broken leg, and

the fracture was a simple oblique fracture, the leg would appear as it does. The witness answered that it would not. The defendant objected to this answer. The court, though requested by defendant, refused to give the following instructions, numbered 3, 4, 6, and 7 respectively: 3. That defendant, if a surgeon of ordinary skill, is not answerable for an error of judgment; 4. That if the injury complained of was occasioned by any act of plaintiff, or any failure on the part of plaintiff to submit to and observe defendant's directions, the jury should find for defendant, though he may have set plaintiff's leg unskillfully; 6. That the jury are not to consider any evidence which does not tend to prove the manner of setting the bone, and the skillfulness in setting the same, and ought to consider only such evidence as tends to prove the setting of the broken bone, and the skill exercised in so doing; 7. That the setting of the broken bone is the act of adjusting the broken fragments to their natural position, and the treatment of the case after that is a different and distinct thing from the setting of the bone. Plaintiff had judgment; defendant appealed.

Ensworth and Loan, for the appellant.

Vories and Vories, for the respondent.

By Court, EWING, J. We cannot perceive the relevancy of the evidence offered by the defendant as to the "weakness of the bones of the plaintiff's family." No such inquiry could properly arise upon the pleadings, or any issue in the cause. The petition alleges unskillfulness in the treatment of the broken limb, and this allegation is traversed by the answer. If any hereditary peculiarity of that kind could have availed as a defense at all, it should have been set up in the answer. There was no offer to prove any inherent defect in the bones of the plaintiff himself, or that the deformity of the leg resulted from any such thing, or that the treatment was rendered more difficult on that account; nor was anything of the kind relied on in the answer.

Whether errors of judgment will or will not make a surgeon liable in a given case depends, not merely upon the fact that he may be ordinarily skillful as such, but whether he has treated the case skillfully, or has exercised in its treatment such reasonable skill and diligence as is ordinarily exercised in his profession. For there may be responsibility where there is no neglect, if the error of judgment be so gross as to be in-

consistent with the use of that degree of skill that it is the duty of every surgeon to bring to the treatment of a case according to the standard indicated. We think, therefore, the defendant's third instruction was well refused, and that the charge given at the instance of the plaintiff was unexceptionable on this point.

The defendant's fourth instruction assumed the non-liability of the defendant if the injury complained of was occasioned in whole or in part by any act of the plaintiff, or any failure on his part to submit to and observe the directions of the defendant relating to his treatment and cure, although the surgeon may have set the plaintiff's thigh unskillfully.

The general principle that a party seeking legal redress must not only show his adversary to be in the wrong, but also that he himself is without fault, is subject to modification when there is mutuality in it, and both parties have contributed to produce the injury; and the instruction, we think, was erroneous. The rule in such cases seems to be, that if the plaintiff substantially contributed to the injury by his improper or negligent conduct, he cannot recover; but if the injury was occasioned by the improper or negligent conduct of the defendant, and the plaintiff did not substantially contribute to produce it, then the latter would be entitled to the verdict: *Sills v. Brown*, 9 Car. & P. 601; *New Haven S. & T. Co. v. Vanderbilt*, 16 Conn. 428.

The sixth and seventh instructions confined the attention of the jury to the single act of setting the bone, and excluded from their consideration all evidence relating to the subsequent treatment of the case by the surgeon. The general treatment of the case by the defendant during the time he was attending the patient was evidently the matter for consideration, and not merely the adjustment of the bones in the first instance. He was, as the evidence shows, attending the defendant for several weeks, and in the course of the treatment the leg became crooked; whether it was caused by unskillfulness or inattention on the part of the surgeon, or the misconduct of the patient in disregarding his instructions, could only be determined by considering the course and character of the treatment during the period of the defendant's professional service.

In reference to the question propounded to Dr. Trevor, although in more general terms than is usually admissible in eliciting the opinion of experts, we think the answer given could not have prejudiced the defendant, as it expressed no

unfavorable opinion as to the treatment of the case, nor as to the cause of the injury or deformity.

Judgment affirmed.

NAPTON, J., concurred.

SCOTT, J., absent.

PHYSICIAN IS LIABLE FOR DAMAGES arising as well from want of skill as from want of application of skill: *Long v. Morrison*, 77 Am. Dec. 73, note 77.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
NEW HAMPSHIRE.

WEBBER v. CHAPMAN.

[42 NEW HAMPSHIRE, 826.]

PRESCRIPTION IN ENGLAND MUST HAVE EXISTED beyond time of legal memory.

PRESCRIPTIVE RIGHT IN THIS COUNTRY IS CREATED by an uninterrupted user of an incorporeal hereditament, under a claim of right for twenty years, as between parties under no disability, with the knowledge of and without interruption from those adversely interested. Such a title is conclusive evidence of a grant or a right, as the case may be; and such user and enjoyment may be used as proof of a deed or record which has been lost by time or accident, or of a prescriptive right which always presupposes a grant.

IN CASE OF PRIVATE WAYS, NON-USER FOR TWENTY YEARS AFFORDS CONCLUSIVE PRESUMPTION that right to them never existed, or has been extinguished in favor of some adverse right.

GRANT WILL BE PRESUMED FROM LAPSE OF TIME AGAINST STATE OR SOVEREIGN as well as against individuals. Thus the grant of a public highway may be presumed. And there is no room for making a distinction between a highway by dedication and one laid out in any other way, by the laws in force upon that subject, or acquired by any process or means whatever.

THERE IS NO MORE INCONSISTENCY IN PRESUMING RECORD OF DISCONTINUANCE OF HIGHWAY TO BE LOST than there is in presuming a lost deed, or release, or grant, or, especially, in presuming a charter or act of incorporation to have been lost.

PRESCRIPTIVE RIGHT TO LAND OF HIGHWAY MAY BE ACQUIRED BY INDIVIDUAL who incloses it and occupies it adversely, uninterruptedly and under a claim of right for more than twenty years. This right may be thus acquired against the public, and all persons claiming or justifying under any public right or easement in such highway.

TRESPASS *quare clausum*, and for taking down and carrying away a gate and bars, whereby the plaintiff's sheep escaped

from his pasture, etc. Plea, the general issue, and also that the *locus in quo* was a public highway, and that the gate and bars mentioned were obstructions therein, which the defendant carefully removed, etc. It appeared on the trial that the *locus in quo* was originally a kind of rangeway, fenced out and occupied as a public highway in Hopkinton as early as 1785. On this rangeway were two houses—one belonging to the defendant, and the other to B. In 1820, the selectmen of Hopkinton laid out a bridle-road across the land of B., and awarded to him a part of the rangeway south of the *locus*. Other facts are stated in the opinion. The court found the issue for the plaintiff.

Marshall, for the defendant.

Flint and Bryant, for the plaintiff.

By Court, SARGENT, J. It was proved that this rangeway had been occupied as a public highway for a long period prior to 1820; that in that year a part of it was assigned to the plaintiff's grantor, by the selectmen, and that, in 1826, it was all assigned to him that then laid between the two houses; that he then extended a fence across this rangeway, at the most northerly house, which, the case finds, he kept up and maintained till 1833, when that house was taken down, and the plaintiff purchased the premises, and in 1834 erected the gate some thirty-six feet farther north than the fence had been, which gate had been kept up, during the summer seasons, to 1859, about twenty-five years.

As the evidence is stated, it might admit of a doubt whether there was proof sufficient to negative explicitly any and all use of the way in question by the public, or by any individuals composing the public, from 1834 to 1859. But no question of that kind is raised in the argument, and we are to presume, and shall assume, that there was competent evidence upon which the finding was based, provided that, in law, the public right could be extinguished by abandonment and non-user by the public, or by an open and visible continued and uninterrupted adverse possession, under a claim of right for twenty years, from and after 1834, by this plaintiff.

By the statute of 1791, which was in force when both these assignments were made, it was provided "that the inhabitants of any town in this state, at any legal meeting held for that purpose, may discontinue any highway, etc., and may sell the land taken up in such highway, or exchange the same for

some other land, where a highway may more conveniently be laid out and occupied. And they may also sell or exchange any land left or appropriated in such town for highways, though not actually improved for that purpose, in the same manner as they may sell or exchange the land of highways improved or occupied:" N. H. Laws 1815, 386. This provision was repealed in 1829. When the selectmen undertook to exchange a part of this rangeway for the land over which they laid the bridle-road, it does not appear that they had any authority from the town to do so, and without such authority these acts would be void, as the inhabitants of the town, at a legal meeting, etc., must make the sale or exchange. But in 1826, when the selectmen undertook to make an assignment of the whole rangeway, to the same individual, up to the most northerly house—to the place where the fence was maintained from 1826 to 1834—the case expressly finds that they did it by or under the authority of the town. Whether that authority was sufficient to pass the land and extinguish the public easement, by a discontinuance of the way, or whether the town undertook to sell it as land left or appropriated for highways, though not actually improved for that purpose, is not material to consider here, since if that assignment were valid and disposed of all the defendant's case, so far as it went, it would not be decisive of this issue, as the *locus in quo*, the gate, and a space thirty-six feet south of it, are not affected by said assignment; and if that had become a public highway, and was such in 1834, by dedication, by prescription, or in any other way, as there is evidence tending to show was the fact, then the question arises whether the public right has in any way been extinguished.

Upon that question the authorities are conflicting. Angell, in his work on highways (section 168), says that though a dedication cannot be revoked by the donor, the highway itself may be relinquished or discontinued by the public; or, according to some authorities, may be lost by long-continued non-user, or by adverse possession for twenty years; though according to other authorities, no lapse of time or cessation of user will deprive the public of the right of passage over a road which has once been a highway, whenever they please to resume it.

The latter doctrine is sustained by the earlier decisions of the common law. Gibbs, J., in *Rex v. St. James*, a manuscript case, referred to in Wheat. Selwin's N. P., 5th Am. ed., 1862,

is reported to have held that where there has been a public king's highway, no length of time during which it may not have been used will prevent the public from resuming the right, if they think proper. To the same effect, substantially, are *King v. Warde*, Cro. Car. 266; *Fowler v. Sanders*, Cro. Jac. 446; *Vooght v. Winch*, 2 Barn. & Ald. 662; *Chad v. Tilsed*, 2 Brod. & Bing. 403. But the later decisions in England, and we think more generally in this country, favor the opposite doctrine. *Simmons v. Cornell*, 1 R. I. 519, together with some other modern authorities, cited in the defendant's brief, which we have not examined, do unquestionably sustain the ancient English doctrine before stated.

But in *Beardslee v. French*, 7 Conn. 125, Hosmer, C. J., says: "Evidence to prove a highway often consists in showing that the public have used and enjoyed the road; and the uninterrupted use of it for a considerable space of time affords a strong presumption of a grant. On the other hand, the non-user of an easement of this kind for many years is *prima facie* evidence of a release of the right to the person over whose land the highway once ran; and although the precise limit of time, in respect to the public in such cases, has not been established, there can be no doubt that the desertion of a public road for nearly a century is strong presumptive evidence that the right of way has been extinguished." In *Commissioners of Georgetown v. Taylor*, 2 Bay (S. C.), 282, where land had been conveyed to the town of Georgetown for streets, but had never been used as such, but had been inclosed and used as a farm for more than forty years, it was held that the doctrine of non-user would apply, which would forfeit a corporate right as well as misuser. The same principle has been established by the supreme court of Ohio, in *Fox v. Hart*, 11 Ohio, 414.

And in Kentucky (*Rowan v. Portland*, 8 B. Mon. 232), where the fee of land, dedicated to the public use, was vested in town trustees for such use, Marshall, C. J., in delivering the opinion, said: "That the public right, as growing out of the dedication, in this case, was subject to be divested and defeated by adverse possession and claim of individual right, admits, as we think, of no doubt. The dedication was not to the commonwealth as a corporate being, and invested no title or interest in it. The maxim, *Nullum tempus occurrit regi*, is therefore inapplicable. And there is nothing to exempt the right, which vested really in the town and its citizens, to be upheld by them for the

public, from the operation of the statute of limitations, or from the presumptions arising from adverse claim and possession, as they would apply in ordinary cases of private right or public easements."

And in *Knight v. Heaton*, 22 Vt. 480, it was held that the inclosure and occupation of land, within the limits of a highway, for twenty years, under a claim of right, made a title by prescription to the land so inclosed and occupied as against the public. Redfield, J., in delivering the opinion in that case, referring to the doctrine that *nullum tempus occurrit regi*, says: "1. Such a long possession is the most conclusive evidence of what was, at the date of the survey, considered its true location, as a long possession under a deed is the most satisfactory evidence of the true location of the thing granted; 2. If it could now be shown beyond all controversy that the survey extended as far upon the plaintiff as now claimed, the non-user, on the part of the public, and the constant use by the plaintiff, under a claim of right, is sufficient to establish a prescriptive right in that class of cases like the present, where no statute of limitations applies."

He then adds: "But it is said, I know, in the English books upon this subject, that one cannot prescribe against the crown. But the same result is obtained, in that class of cases, by presuming a grant." He refers to *Johnson v. Ireland*, 11 East, 280, in which Lord Ellenborough said: "I would presume anything capable of being presumed, in order to support an enjoyment for so long a period; as Lord Kenyon once said on a similar occasion, that he would not only presume one, but one hundred grants if necessary to support so long an enjoyment."

So in *Hillary v. Waller*, 12 Ves. 239, 265, Lord Eldon observes: "I have heard it stated that this [the presumption of abandonment, or of a grant from non-user] does not apply to a case of a public road. It applies more to that than to a private road. The reason given was, that there cannot be the same presumption of a surrender. If by matter of record, the right appears vested in the public, it may be so, as there the right appears, and the surrender does not appear. But if the right does not rest upon matter of record, and the public have not enjoyed it, it is to be left to the jury to presume, and is almost conclusive, not that it was surrendered, but that it never existed; and for this special reason, one man may surrender, or for many reasons may not enjoy, his right; but the

probability is, as to the public, that some instance of enjoyment would be shown. This is much stronger than the case of a private road, if for many years there has been no enjoyment; for what one man may relinquish, another may be disposed to assert."

That case must be a good authority for the plaintiff here, as there is no record of any laying out of the highway in the case we are considering. So in *Alves v. Henderson*, 16 B. Mon. 131, it is said that a private citizen may, by exclusive use and adverse possession of land dedicated to the public use for the space of twenty years, acquire a valid right thereto.

It would seem from these decisions, and others tending in the same direction, that the doctrine of the ancient authorities had been widely departed from, if not entirely superseded. And we are disposed to think that the rule established in many states, as indicated by these recent decisions, is in accordance with the spirit of the age and with sound reason. We are not called upon to decide, as seems to be contended in the defendant's argument, that a trespass can ripen into a right by long continuance, or that a twenty years' continuance of a public nuisance, admitted to be such, would give the individual any rights as against the public. But from such adverse possession, continued uninterruptedly for twenty years or more on one side, and such total non-user upon the other for the same time (for the enjoyment, and any and all acts of enjoyment or use, must have totally ceased during that whole period), we are to infer that a highway here never existed, or if it ever existed, that it has been discontinued, or that the public right has been in some way surrendered, discharged, or relinquished.

In the case of private ways, a non-user for twenty years affords a presumption that the right never existed, or has been extinguished in favor of some adverse right. As an enjoyment for twenty years is necessary to found a presumption of a grant, the general rule is, that there must be a similar non-user to raise the presumption of a release. And although there may be some exceptions to this rule in case of the non-user of certain easements, it is believed that in the case of private ways it is of very general, if not of universal, application: 3 Kent's Com. 448, 449; *Corning v. Gould*, 16 Wend. 531; *Hazard v. Robinson*, 3 Mason, 275; *Wright v. Freeman*, 5 Har. & J. 467; 3 Greenl. Cru., tit. 81, c. 1, sec. 40; Co. Lit. 114 b; *Emerson v. Wiley*, 10 Pick. 310; see Lord Erskine, in

Hillary v. Waller, 12 Ves. 265; *Doe v. Hilder*, 2 Barn. & Ald. 791; see Littledale, J., in *Moore v. Rawson*, 3 Barn. & Cress. 839.

And this presumption, which arises upon proof of these facts, is in this state held to be not merely a *presumptio juris*, a presumption that may be rebutted, but it is held to be a *presumptio juris et de jure*, one that is entirely conclusive in law of the existence of a grant or right, as the case may be, wherever by possibility a right can be acquired in any manner known to the law: See *Wallace v. Fletcher*, 30 N. H. 434, and numerous authorities there cited. This rule relates to all incorporeal hereditaments, and of course includes private ways; and Bell, J., in the opinion in that case, says: "We have already stated our impression that by the law, as generally recognized in this country, the party claiming title under such possession is not obliged to rely merely on a presumption of a grant, but he may rest on a presumption of right or of any grant, reservation, or record, which may be necessary to establish his title. And it seems to us that this may properly be regarded as a species of prescription established here by a course of judicial decisions, by analogy to the statute of limitations of real actions."

A grant will be presumed from lapse of time, against the state or sovereign, as well as against individuals: 1 Greenl. Ev., sec. 45; *Mayor of Kingston v. Horner*, Cowp. 102; *Crooker v. Pendleton*, 23 Me. 339; *Bow v. Allenstown*, 34 N. H. 351 [69 Am. Dec. 489].

And the same doctrine applies with equal force, and should be applied for the same reasons, to the case of public highways: *Rex v. Montague*, 4 Barn. & Cress. 604; *Beardslee v. French*, 7 Conn. 125 [18 Am. Dec. 86]; *Commissioners of Georgetown v. Taylor*, 2 Bay, 282; *Fox v. Hart*, 11 Ohio, 414; *Rowan v. Portland*, 8 B. Mon. 232; *Knight v. Heaton*, 22 Vt. 489; *Johnson v. Ireland*, 11 East, 279; *Hillary v. Waller*, 12 Ves. 239, 265; *Alves v. Henderson*, 16 B. Mon. 131, which have been cited and examined.

Nor do we see any cause for making a distinction between a highway by dedication and one laid out in any other way by the laws in force upon that subject, or acquired by any process or means whatever. Suppose it appears that the road was legally laid out, and that is matter of record. It is no more a public highway than as though the right had been acquired by the public by dedication. Nor are the public rights any

greater in the one case than in the other, or any different. Nor is there any more inconsistency in presuming a record of the discontinuance of the highway to be lost, than there is in presuming a lost deed, or release, or grant, or especially, as in *Bow v. Allenstown*, 34 N. H. 351 [69 Am. Dec. 489], in presuming a charter or act of incorporation of a town from the royal governor of the province or the legislature of the state to have been lost, from precisely the same evidence.

For although in England a prescription must have existed beyond time of legal memory, yet here, by analogy to the statute of limitations, an uninterrupted user of an incorporeal hereditament, under a claim of right for twenty years, as between parties under no disability, with the knowledge and without interruption of those adversely interested, affords conclusive evidence of a grant or a right, as the case may be. Such user and enjoyment may be used as proof of a deed or record which has been lost by time or accident, or of a prescriptive right which always presupposes a grant. Such a title may well be called a prescription, agreeably to the ancient use of that term, though it depends upon a period of twenty years, and has no connection with the time of legal or actual memory: *Wallace v. Fletcher*, 30 N. H. 434; *Bow v. Allenstown*, 34 Id. 351 [69 Am. Dec. 489]; *Dare v. Heathcote*, 36 Eng. L. & Eq. 564.

We shall only therefore be carrying out and applying the same doctrines and principles in this case, and for the same reasons which have been applied by the court in the other cases in this state already referred to, and we think the doctrines of those cases are not only well founded upon authority, but also upon sound reason, and that there can be no reason urged in this case against its application which might not have been urged with equal force at least against its application in *Bow v. Allenstown*, 34 N. H. 351 [69 Am. Dec. 489], and that therefore there must be, upon the finding of the court, judgment for the plaintiff.

PREScriptive RIGHT TO LAND, HOW ACQUIRED: *Bow v. Allenstown*, 69 Am. Dec. 489; *McArthur v. Carrie's Adm'r*, 70 Id. 529, and collected cases in note thereto 540; *Ford v. Wilson*, 72 Id. 137; *Roundtree v. Brantley*, 73 Id. 470.

GRANT WILL BE PRESUMED WHEN: *McCoy v. Morrow*, 68 Am. Dec. 578; *Daggett v. Durden*, 65 Id. 633; *Wheatley v. Baugh*, 64 Id. 721; *Watkins v. Peck*, 40 Id. 156; note to *McCullough v. Wall*, 53 Id. 726; *Strimpfler v. Roberts*, 57 Id. 606, and note 618; *Armstrong v. Risteau*, 59 Id. 115; *Stevenson's Heirs v. McReary*, 51 Id. 102; *Wallace v. Maxwell*, Id. 380, and note 382; *Alexander v.*

Waller, 50 Id. 688; *Berthelemy v. Johnson*, 38 Id. 179; *Brown v. McKinney*, 36 Id. 139.

GRANT OF PUBLIC HIGHWAY WILL BE PRESUMED WHEN: *Hobbs v. Lowell*, 31 Am. Dec. 145, and note 150; note to *Vick v. Vicksburg*, Id. 188; *State v. Hunter*, 44 Id. 41, and collected cases in note thereto 42; note to *French v. Martin*, 57 Id. 299; *Reed v. Northfield*, 23 Id. 662, and note 669.

THE PRINCIPAL CASE WAS DISCUSSED in *State v. Franklin Falls Co.*, 49 N. H. 256, 257. It appeared that the next year after the principal case was decided, the statute of 1862 established from that time forward exactly the opposite rule to that promulgated in the principal case, and the statute was intended to reverse the rule laid down in that case. In *State v. Franklin Falls Co.*, *supra*, it was held that the maintenance of dams without fishways, in an innavigable river, which is the outlet to a large inland lake, thereby obstructing the passage of migratory fish from the sea to the lake, constitutes an indictable offense at common law. It was also held that no right will be acquired, as against the state, by the obstruction of a public fishway, though continued for more than twenty years under a claim of right, if such obstruction in fact originated without right. Counsel for respondents cited the principal case as one in which the question of prescriptive right had been adjudicated, and wherein the question of adverse possession as against the public had been carefully examined. "Applying the law of *Webber v. Chapman*," said they, "to the present case, any public easement in the water of the Winnipiseogee river at these dams was clearly extinguished when the present law was passed requiring fishways. If it is to receive new life from the legislature, like the relaying of a discontinued highway, proceedings must begin *de novo*, and honest payment made for private property taken or despoiled." The court, however, decided that an adverse user, which was known to have originated without right within the memory of persons then living, would not alone and of itself legitimate a public nuisance, or bar the public of their rights. And in distinguishing the principal case, the court said that in the principal case there was no evidence, except user, of the existence of the public right; and that the court expressly said in that case that it was not called upon to decide that a twenty years' continuance of a public nuisance, admitted to be such, would give the individual any rights as against the public. The principal case was further distinguished, on the ground that the public right there under consideration was one which numerous public officers were annually appointed to preserve and protect; while the right of fishery had, till recently, been left very much to take care of itself. The court, in *State v. Franklin Falls Co.*, 49 N. H. 256, said that when there were special reasons for re-examining a question once decided, they would do so; but that on so important a topic as the one under consideration, it was quite embarrassing in practice to apply one rule up to 1862, and the contrary rule after that date. "Under these circumstances," said they, "we do not feel bound to adhere to the former decision, if upon examination it is found to be opposed to reason, and to the weight of authority, as well as to 'the spirit of our legislation.'" The justice who delivered the opinion of the court in the principal case concurred in this decision.

It has been held in other states that while a dedication cannot be revoked by the donor (*Commonwealth v. Alburger*, 1 Whart. 469; *Trustees of Watertown v. Cowen*, 4 Paige, 510; S. C., 27 Am. Dec. 80), the highway itself may be relinquished or discontinued by the public; or, according to some authorities, may be lost by long-continued non-user, or by adverse possession for twenty years: *Alves v. Town of Henderson*, 16 B. Mon. 131; *Peckham v. Hen-*

derson, 27 Barb. 207. But according to other authorities, no lapse of time or cessation of user will deprive the public of the right of passage over a road which has once been a highway, whenever they please to resume it: *Henshaw v. Hunting*, 1 Gray, 203; *Lewiston v. Proctor*, 27 Ill. 414.

MORRISON v. HOLT.

[42 NEW HAMPSHIRE, 478.]

HUSBAND IS LEGALLY BOUND FOR NECESSARIES SUPPLIED TO WIFE so long as she does not violate her duty as wife.

IF HUSBAND DOES NOT HIMSELF PROVIDE FOR WIFE'S SUPPORT, HE IS LEGALLY LIABLE FOR NECESSARIES furnished her, even though against his orders.

LEGAL EXPENSES ARE DEEMED NECESSARIES where the conduct of the husband has rendered them necessary for the personal protection and safety of the wife.

WIFE'S AUTHORITY TO BIND HER HUSBAND FOR NECESSARIES IS IMPLIED, because of the marital relation, and depends upon the necessity of the expenditures for her support, or protection as wife.

HUSBAND IS NOT LIABLE TO ATTORNEY FOR PROFESSIONAL SERVICES RENDERED HIS WIFE in prosecuting a divorce suit against him upon the ground of adultery.

ASSUMPSIT to recover amount due for professional services rendered to Ruth S. Holt, the defendant's wife. It appeared that the wife had applied to the plaintiff to aid her in procuring a divorce from the defendant, upon the ground of adultery. A libel for divorce was filed and served, and testimony taken; but before a decree was made, the parties came together, and lived as they did before the suit was commenced. Thereupon the libel was dismissed. It was agreed that plaintiff's charges were reasonable, and that the wife had a good ground of divorce. If plaintiffs were entitled to recover, judgment was to be rendered for them as upon default for the amount of their bill; otherwise, for the defendant for costs.

Morrison and Stanley, for the plaintiffs.

Cross and Topliff, for the defendant.

By Court, BARTLETT, J. No precedent has been cited for maintaining an action like the present. The plaintiffs do not show that the defendant's wife had any express authority from him to procure the services for which this suit is brought, and if the defendant is liable for them, it must be upon the ground that she had an implied authority to obtain them upon his credit.

"It is a settled principle, in the law of husband and wife,

that by virtue of the marital relation, and in consequence of the obligations assumed by him upon marriage, the husband is legally bound for the supply of necessities to the wife so long as she does not violate her duty as wife." "If he does not himself provide for her support, he is legally liable for necessities furnished her, even though against his orders:" 2 Smith's Lead. Cas. 364. Legal expenses are deemed necessities where the conduct of the husband has rendered them necessary for the personal protection and safety of the wife: *Morris v. Palmer*, 39 N. H. 126; *Clancy's Husband and Wife*, 52. The authority of the wife, in such cases, is implied because of the marital relation, and depends upon the necessity of the expenditures for her support or protection as wife.

In order to charge the defendant in the present case, it is not sufficient for the plaintiffs merely to show that the defendant's misconduct gave occasion for the proceedings instituted by the wife, but it must also appear that those proceedings were necessary for the personal protection and safety of the wife. There is no evidence tending to show this; the proceedings were not had for her present or even future support as the defendant's wife, but they were intended to dissolve the marriage contract and release her from the position of wife to the defendant, because of his past misconduct; they looked not to protection from any present or future act of her husband, but merely to the enforcement of a right to a change of future condition, that she claimed had arisen from his previous fault. It has not been the policy of our law to imply from the marital relation any authority in the wife to bind the husband for the expense of such proceedings; her implied authority, where it exists, seems to arise from the relation, if not as an incident essential to its preservation, certainly as a consequence of its continued existence, and not as a power reserved for its destruction. It is said that "it is never necessary for the safety of the wife, as such, to obtain a divorce from her husband or to resist his obtaining one from her:" Bishop on Marriage and Divorce, sec. 571.

We need not inquire whether this is true to its fullest extent; the present case shows no such necessity. It is "unlike her exhibiting articles of the peace against her husband, but rather resembles in this respect a criminal prosecution on her behalf against him for an assault, where he cannot be held for her counsel fees and other expenses:" Bishop on Marriage and Divorce, sec. 571. In *Grindell v. Godmond*, 5 Ad. & El. 755,

as in the present case, the proceedings were founded upon the past misconduct of the husband; yet as they were not necessary to her safety as wife, it was held that she had no implied authority to pledge his credit for them. *Brown v. Ackroyd*, 34 Eng. L. & Eq. 217, is not an authority to support the plaintiff's claim. There, the wife had attempted to obtain a divorce *a mensa et thoro* on ground of cruelty, and although the husband was not in fact charged with the cost of that proceeding, the court held that obtaining a decree for a separation was as proper means of protection against personal violence as exhibiting articles of the peace. Whether it would be so held under our practice in case of a suit for divorce upon the ground of extreme cruelty, we need not inquire. In *Brown v. Ackroyd*, 34 Eng. L. & Eq. 217, the authority to procure the services was held to arise, not upon the mere ground of the wife's right to a divorce, but because a decree of separation was deemed, under the English practice, necessary means for her protection from personal violence, where she had been treated with such cruelty as justified her in appealing to the ecclesiastical court. The same distinction has been recognized elsewhere: *Williams v. Monroe*, 18 B. Mon. 518. We find these views supported by the decisions in other jurisdictions: *Shelton v. Pendleton*, 18 Conn. 417; *Wing v. Hurlburt*, 15 Vt. 607 [40 Am. Dec. 695]; *Coffin v. Dunham*, 8 Cush. 404 [54 Am. Dec. 769]; *Dorsey v. Goodenow*, Wright, 120; *Johnson v. Williams*, 3 G. Greene, 99 [54 Am. Dec. 491]; *Williams v. Munroe*, 18 B. Mon. 518.

Upon the principles of the common law, then, the defendant is not liable in the present case; nor do we think he is made so by statute. It does not follow that because the wife may have a right to a divorce, the husband is bound to furnish the means to obtain it. Our practice as to the provision of means for the wife during the pendency of a suit for divorce differs somewhat from that in England. In this state "it has not been the practice of the court in such cases to allow costs, as such, to either party, except partially, in some instances, by interlocutory orders. If the wife is libellant and prevails, her expenses are usually considered in awarding her alimony." Where the husband applies for a divorce under certain circumstances, small sums have been ordered to be paid to the wife to enable her to make her defense: *Morris v. Palmer*, 39 N. H. 128; *Parsons v. Parsons*, 9 Id. 319 [32 Am. Dec. 362]; *Coffin v. Dunham*, 8 Cush. 405 [54 Am. Dec. 769]. If, then,

under the settled practice of the court, the husband has not been held bound by any implication from the statute to furnish directly to the wife the means to procure a divorce, there is no reason to hold that he can be compelled to do so indirectly by any inference from the same statute. We see no legal ground upon which the defendant can be held liable in this action, and there must be judgment for the defendant.

HUSBAND'S LIABILITY FOR WIFE'S NECESSARIES: *Johnson v. Williams*, 54 Am. Dec. 491, and note 492; *Norcross v. Rodgers*, 73 Id. 323, and note 326; *Callahan v. Patterson*, 51 Id. 712; *Billing v. Pilcher*, 46 Id. 523; *Walker v. Simpson*, 42 Id. 216; *Mitchell v. Treanor*, 56 Id. 421. Wife's implied authority to bind husband for necessities supplied to her depends wholly upon his legal obligation to provide for her: *Gill v. Read*, 73 Id. 73.

NECESSARIES FOR WIFE, WHAT ARE: See note to *Cunningham v. Irwin*, 10 Am. Dec. 462.

LIABILITY OF HUSBAND FOR LEGAL SERVICES rendered to his wife in prosecuting or defending an action for divorce: See note to *Cunningham v. Irwin*, 10 Am. Dec. 463, discussing the subject at some length; *Johnson v. Williams*, 54 Id. 491, and note 492; *Sprayberry v. Merk*, 76 Id. 637, and note 638. These cases show when counsel fees are necessities, and when not.

THE PRINCIPAL CASE WAS CITED in *Smith v. Davis*, 45 N. H. 570, to the point that where a complaint was made by a wife against her husband for assault and battery, and a warrant was obtained by her, the husband was not liable to the attorney employed by the wife, for services and expenditures by the attorney in relation to the complaint and warrant, unless such services and expenditures were found to be necessities. If not so found, the husband would not be liable for them.

HAVERHILL INSURANCE COMPANY v. PRESCOTT.

[42 NEW HAMPSHIRE, 547.]

DECLARATION MAY BE AMENDED where the court can see that the identity of the cause of action is preserved.

THERE IS POWER TO AMEND ON REVIEW.

NEW HAMPSHIRE LAWS IMPOSE UPON MASSACHUSETTS MUTUAL INSURANCE COMPANIES acting within the state of New Hampshire the same obligations and disabilities that the laws of Massachusetts impose upon New Hampshire insurance companies acting within the state of Massachusetts.

WHERE CONTRACT OF INSURANCE WAS MADE WITH RESIDENT OF NEW HAMPSHIRE, and upon property situated there, by a Massachusetts mutual insurance company, which had not complied, in New Hampshire, with the obligations and requirements imposed by the laws of Massachusetts upon like corporations chartered by the laws of New Hampshire and acting in Massachusetts, it was held that the contract was invalid in New Hampshire, and that an action there upon the premium note could not be maintained.

ASSUMPSIT upon a note given by defendants for assessments. Judgment was rendered at a former term for the plaintiffs, and the action was pending upon a writ of review. Plaintiff moved to amend his declaration by inserting a new count. Defendants objected to the amendment as materially changing the cause of action; but it being shown that defendants, Prescott and Philbrick, were insured in but one policy of the company, and that both counts were founded upon one and the same premium note, the amendment was allowed. With the general issue, defendants filed a brief statement that plaintiffs had never complied with the laws of Massachusetts, nor with the laws of New Hampshire, so as to enable them to bring and maintain the action. Plaintiff's evidence tended to prove the incorporation of said company, and that it was organized and commenced business on December 25, 1841. The defendants insisted that the plaintiffs, being a corporation established in Massachusetts, had not complied with the requirements imposed by the laws of that state upon insurance companies established by law in New Hampshire, and taking insurance in Massachusetts. It was admitted that there was no such compliance, but it was insisted that both parties were *in pari delicto*. A verdict was taken by consent, subject to the opinion of the court, and the case was transferred.

J. W. Towle, for the defendants.

Wood, for the plaintiff.

By Court, **BELLOWS, J.** There is no objection to the amendment of the declaration upon the ground alleged, for the court can see that the identity of the cause of action is preserved: *Stevenson v. Mudgett*, 10 N. H. 338 [34 Am. Dec. 155]. Nor is there any want of power to amend on review: *Burley v. Burley*, 6 Id. 204.

The important question then is, whether the contract of insurance is valid in this state. By the law of this state of December, 1852 (Comp. Stats. 371, c. 1279, secs. 4-6), it is provided that where, by the laws of another state, "any taxes, fines, penalties, deposits of money or of securities, statements, or other obligations or requirements of any description whatever, are or shall be imposed upon any mutual insurance company, incorporated by or organized under the laws of this state," or upon its agents, then "the same taxes, fines, penalties, deposits, statements, obligations, and requirements" shall be imposed upon all mutual insurance companies existing

under the laws of such other state, and doing business here, and also upon their agents.

By the law of Massachusetts (Laws of 1854, 773, c. 331, sec. 1) it is provided in substance that no foreign insurance company shall make any insurance on property within that state, nor contract for any insurance with any party resident there, until it has complied with the provisions of that act.

By section 4 of chapter 23 of the Massachusetts general laws, ed. 1854, 845, it is provided that no person shall be allowed to act as agent of any such foreign insurance company, until such company and such agent shall have complied with all the requirements of their laws, under a penalty of one thousand dollars for each offense.

It being now admitted that the plaintiff insurance company has not, in this state, complied with the provisions of these Massachusetts laws, the question is, how far these provisions are in force in New Hampshire, and what is their effect upon this contract.

Our law, in its terms, imposes upon Massachusetts mutual insurance companies the same obligations and requirements that the laws of Massachusetts impose upon New Hampshire insurance companies; and to determine what is the law here, we must look at the legislation in Massachusetts. There, as we have seen, the provisions are that no foreign insurance company shall make any insurance on property in Massachusetts, or make a contract of insurance with a party resident there, until it complies with the provisions of the act; nor shall any person act as agent for such company until such compliance. If these provisions are the law of New Hampshire in respect to Massachusetts companies, then there is a direct prohibition of contracts to insure property in this state, by such Massachusetts company, without there has been a compliance with the requisitions of the act; and the want of such compliance being admitted, and the property insured being in this state, and the parties insured resident here, the insurance would be invalid, and therefore there is no consideration for the note.

Are these provisions, then, the law of New Hampshire? The substance of the Massachusetts enactment is, that until a compliance with certain requisitions by such foreign insurance companies, they can make no valid contract of insurance in respect to property there situate, or with parties there resident. By imposing the same obligations and requirements upon their insurance companies, our law seeks to impose the

same disabilities, namely, the inability to make a valid contract of insurance on property situated here, or with parties resident here. To require the same things to be done, but without subjecting the company to any legal disability for omitting them, is inconsistent with the manifest purpose of the act; nor does the language require such a construction. But it is said that the disability only extends to the agents of such companies; but we cannot view it in that light, inasmuch as the obligations and requirements are imposed upon both the company and their agents; and we think that the compliance with such obligations and requirements must precede the power to make such contracts in New Hampshire. If the suit was brought by the defendants to recover back money paid by them for such illegal insurance, the court would undoubtedly decline to lend its aid, provided the parties stood *in pari delicto*, and so would it be in the suit before us.

The contract of insurance, then, being invalid, the note declared on is without consideration, and this makes it unnecessary to consider the other questions. There must, therefore, be judgment on the verdict.

PLEADING MAY BE AMENDED, where cause of action is not changed: *Hubler v. Pullen*, 68 Am. Dec. 620, and note 623; *Blackwell v. Blackwell*, 70 Id. 556; but an amendment introducing a new cause of action cannot be allowed: See note to *Davis v. Mayor etc. of New York*, 67 Id. 204. As to how far amendments varying or altering cause of action may be allowed, see exhaustive note on the subject, *Stevenson v. Mudgett*, 34 Id. 158-162; and references in note to *Teas v. McDonald*, 65 Id. 73. The allowance of amendments is addressed to the sound discretion of the court: See note to *Cooke v. Spears*, 56 Id. 350, with collected cases.

THE PRINCIPAL CASE WAS DISTINGUISHED in *Union Ins. Co. v. Smart*, 60 N. H. 460, where it was held that a foreign insurance company might recover in an action upon a premium note given as the consideration for a contract of insurance made in New Hampshire, although such company had not complied with the laws of that state in regard to insurance. It was there said that in the principal case the plaintiffs had not complied with the laws of New Hampshire, and it was held that the company having no power to make such contracts in New Hampshire, the insurance was invalid, and constituted no consideration for the note. But this was prior to the statute first passed in 1862, declaring that any insurance made by a foreign insurance company should be valid against the company, although it had not complied with the requirements of the statute of New Hampshire. The contract of insurance in the principal case was declared invalid, because the foreign company was prohibited by the statute of New Hampshire from engaging in such business in that state until it had complied with the laws of that state. To remedy the injustice to persons holding policies in foreign insurance companies, thus declared invalid, the statute of 1862 was passed. This statute was one of protection to the insured. "To give the policy holder the protection in-

tended by statute, it is," said the court, "necessary to hold the premium note, given for a policy declared by the statute valid against the company also valid; otherwise there would be no consideration for the policy." The statute of 1862 declared that a foreign company should not recover any premium or assessment on any contract of insurance with any citizen of the state of New Hampshire until it should comply with the provisions of the statute of that state. But this provision was omitted in the revisions of 1867 and 1878.

FRENCH v. HAYES.

[43 NEW HAMPSHIRE, 80.]

EVIDENCE OF SURROUNDING CIRCUMSTANCES IS ADMISSIBLE to enable the court to put itself in the place of the party, where doubt arises as to the meaning of a written instrument.

DECLARATION OF PARTY IS ADMISSIBLE TO DETERMINE TO WHICH OF TWO PATHS an ambiguous description in an instrument is intended to apply.

CASE. H. Garland died, and her property was divided between her daughters, Ann and Sarah, in 1834. To the former was given the south half of the land, and to the latter the north half, with a privilege in the cart-path over the south half. Plaintiff and defendant owned the north and south parts respectively, with the privileges attached. On the line of the path was a hog-house. Plaintiff claimed that the path passed on the south side and defendant claimed that it passed on the north side of the hog-house. In 1857, defendant plowed the land on the south side of the hog-house, and plaintiff brought suit for obstructing the way. Defendant introduced testimony, against plaintiff's objection, showing the condition of the land in 1834; that there were two paths; and what the parties making the division intended. Verdict for defendant, and plaintiff appealed.

Small, for the plaintiff.

Christie, for the defendant.

By Court, BELL, C. J. Where any doubt arises as to the meaning of any written instrument, as, for example, a contract, deed, or will, the court endeavors to put itself in the place of the party, by receiving evidence of the surrounding circumstances. Thus, if the language of an instrument is applicable to several persons, to several parcels of land, to several species of goods; to several monuments or boundaries, or to several writings; or if the terms are vague and general, or have several meanings; or if the description of any person, or thing, or circumstance, is true in part, but not true in every particular—

parol evidence is admissible of any extrinsic circumstances tending to show what person or persons, or what things, were intended, or to ascertain the meaning in any other respect: 1 Greenl. Ev., secs. 288, 289. And proof of all material facts is admissible, from which the intent of the party in using the expressions may be inferred, or which will enable the court to identify the person or thing meant to be designated: 2 Phill. Ev. 315, 2 Cowen & Hill's Notes, 273.

The controversy here was, what was intended by the committee who made the partition in 1834 by the term "cart-path." The term itself is quite free from ambiguity. It is only when, upon applying the language to the facts of the case, it is found that there is an uncertainty as to a part of the way, which of two routes, to which it is contended that description may apply, was intended, that any doubt arises; and that doubt may be obviated by any evidence of the condition of the property, and other circumstances which may tend to show what was meant. The evidence tends to show that there were two cart-paths for a part of the way, either of which might be that intended. It is the common case of an uncertain description. Land, for example, is described as bounded at one corner by an oak-tree. Among several oaks, it is made a question which was intended. It may be shown that one was marked, and others were not; that one had been the point to which, on certain occasions, measurements had been made; or that one was shown at the time of the conveyance, by the party or by those who took part in the transaction, as the corner; or that it had been shown or talked of by parties in interest as the corner; or that it had been treated as the corner, as by clearing, or plowing to it, or building fences to it, or the like.

Now, these are the precise kinds of evidence which are objected to in this case. The evidence that the land in one of the routes contended for was plowed up, is a circumstance tending to show that no cart-path, or right of way, was admitted to exist there, because it is not usual to plow up the cart-paths on a farm, especially where third persons have a right to their unobstructed use.

So the evidence that carts were driven on both sides of the hog-house tended to show that it was then uncertain or doubtful where the path was, or it might tend to fix it on one side or the other, if the preponderance of the evidence showed the common path on one side, and that the other was only occasionally used.

Among the circumstances which could not fail to have great weight in determining what was meant by the doubtful or uncertain terms of a writing would be the acts of the parties indicating that intention, either occurring at the time of the writing, or appearing to be otherwise connected with it. If a party, for instance, when making a deed of land should describe it as bounded at the corners by stakes, and should at the time, or subsequently, go upon the land and set up stakes there intended to be those referred to in the deed, there would be no doubt that all parties would be held bound by those monuments: *Lerned v. Morrill*, 2 N. H. 198; *Waterman v. Johnson*, 13 Pick. 267. So where a party who had in a deed described a lot as eighty-five feet, more or less, subsequently put upon the record a plan in which the land was described as eighty-eight or eighty-nine feet deep, it was conclusive of an intention that the land conveyed should extend so far: *Blaney v. Rice*, 20 Id. 64 [32 Am. Dec. 204].

The declarations of the parties as to their intention, made at or about the time, may properly be regarded as acts, and just as the acts of the committee would be held strong evidence of what was intended as if they had at the time designated the cart-path they intended by stakes driven into the ground, so it would seem that with equal reason the act of the committee who made the division, in pointing out at the time what they intended by their assignment, must be evidence well deserving the consideration of the court. And it would not be easy to exclude the testimony of that member of the committee who testified to the intention of the committee as to the route assigned.

The case, however, is one of that class where parol evidence of declarations of intention on the part of a grantor or devisor are admissible; namely, the class where the description of the person or thing intended is applicable with legal certainty to each of the subjects as to which the dispute exists: *Wigram's Extr. Ev.* 160; 2 *Phill. Ev.* 322.

The rule is thus stated in 2 Cowen & Hill's Notes to *Phill. Ev.* 534: "An exception (and it seems the only one, strictly speaking) to the general rule excluding evidence of intention, is allowed where the language of the instrument is applicable indifferently to more than one object or subject. There the inquiry is, it seems, which of the objects or subjects was intended by the party; in other words, which one he meant to describe; and then evidence of declarations made by him,

showing his intent, are admissible; and the instance cited in illustration of the rule is the case before us." Where a way is granted, and there are two ways to which the description applies, evidence of the declarations of the grantor is admissible to identify the one intended: *Osborn v. Wise*, 7 Car. & P. 761.

The evidence tended to show that the path, as to which inquiries were made of Knight, was an old path, though it did not appear that it was known by that appellation. It would not therefore seem that there was any doubt or ambiguity arising from the use of that expression. The question might be objectionable on the ground that it assumed the very point in controversy; but that does not appear to be the case here. Nothing depended on the age of the path, and there is nothing which shows that the jury were in any danger of being misled by the question. It was evidently in the power of the plaintiff, by proper inquiries, to remove all grounds of doubt.

As the exceptions do not seem to us well founded, there must be judgment on the verdict.

IN CONSTRUING WRITING, IT IS PROPER TO LOOK AT ALL SURROUNDING CIRCUMSTANCES, the pre-existing relation between the parties, and then to see what they mean when they speak: *Blossom v. Griffin*, 67 Am. Dec. 75, and extended note thereto 80, 81, on surrounding circumstances and pre-existing relations of parties considered in construing contract.

PARKER v. BARKER

[43 NEW HAMPSHIRE, 85.]

OMISSION TO INSERT PROPER DIRECTION IN WRIT IS NOT FATAL, if it is served by the proper officer. The writ may be amended on motion, and the objection will thus be obviated.

ON MOTION TO AMEND WRIT, IT MUST BE SHOWN, either upon the facts or face of the writ and return, that the amended form would be proper.

APPEAL, AFTER JUDGMENT ON MERITS, DOES NOT OPEN QUESTION of the propriety of an amendment, or of the decision upon a motion to quash the writ.

APPEAL from the judgment of a justice of the peace. It appeared from the writ, returns, and record of the justice, that the plaintiff was described as of Wolfborough, Carroll county; the principal defendant as of Alton, Belknap county; and the trustee as of Wolfborough. The writ was directed to the sheriff of Carroll county, or his deputy, or to the constable of any town in said county. It was served on the trustee by a

constable of Wolfborough, whose return showed that he had attached a quantity of boards on the wharf of the steamer *Lady of the Lake*, in Wolfborough, as the property of the defendant. The writ was served on the principal defendant, in Belknap county, by a deputy sheriff of that county. Defendant appeared specially on the return day, and moved that the writ be quashed for want of jurisdiction. The plaintiff asked to amend the writ by inserting a direction to the sheriff of any county in the state. The motion to amend, though objected to, was allowed, while the motion to quash was overruled. Plaintiff discharged the trustee and recovered judgment, from which the defendant appealed. Defendant renewed his motion, at the trial term, to quash the writ, but it was overruled. He excepted and filed his bill of exceptions, which was allowed.

Moody, for the defendant.

Hill, for the plaintiff.

By Court, BELL, C. J. The action, being personal and transitory, could be properly brought in the county, where either of the parties, the plaintiff or the principal defendant, resided: R. S., c. 180, sec. 1; c. 208, sec. 2. The justice, therefore, had jurisdiction, if the parties were regularly brought before him.

Justices' writs must be directed to the sheriff of the county, or his deputy, or to any constable of any town in the county: R. S., c. 182, sec. 4; except where the defendant has personal property liable to attachment, in a county in which he does not reside: R. S., sec. 6; or a trustee named in the writ resides out of the county in which the action is brought: R. S., c. 208, sec. 40; in which cases the writ may be directed to the sheriff of any county.

Here personal property of the defendant was attached, "a quantity of boards;" and money or other personal property was required to be attached in the hands of the trustee. The writ therefore might properly be addressed to the sheriff of any county, and properly served by the sheriff of Belknap, or his deputy. It was so served, but was not so addressed, and the sheriff of that county, upon the general rules of the law, had no authority to serve it. The defendant took a legal and proper course to avail himself of the defect of service, which appeared on the face of the writ and return: *Tilton v. Parker*, 4 N. H. 142; *Morse v. Calley*, 5 Id. 222; *Parsons v. Swett*, 32 Id. 87 [64 Am. Dec. 352]; *Farley v. Day*, 26 Id. 531.

But an omission to insert the proper direction, if the writ is

served by the proper officer, is not fatal. It may be amended on motion, and leave granted to insert the proper direction, and the objection will be thus obviated: *Brown v. Dudley*, 33 N. H. 514; *Tilton v. Parker*, 4 Id. 144. The motion to quash the writ, after such an amendment, was properly overruled by the justice; and if the question could be properly raised here, it would be so overruled by this court.

The motion to amend could be properly granted in the discretion of the court, only upon its being shown by affidavit that it might rightfully have been so made originally, unless that appears on the face of the writ and return. In the present case, it appears now that nothing was in the hands of the trustee, and an attachment of "a quantity of boards," without further description, is a nominal attachment; but it might be shown that there was property intended to be reached.

An appeal taken after judgment, on the merits, does not open the question of the propriety of an amendment of the writ, or of the decision upon a motion to quash it. The motion at the trial term was therefore properly overruled. Exception overruled.

Judgment affirmed.

AMENDMENT OF RETURNS TO WRIT.—This subject is discussed in an extended note to *Malone v. Samuel*, 13 Am. Dec. 173–181; see also *Deane v. Spence*, 30 Id. 241, and note 247.

STATE v. FORSHNER.

[43 NEW HAMPSHIRE, 89.]

GENERAL BAD CHARACTER OF PROSECUTRIX FOR CHASTITY may be shown upon trial for rape, but not particular instances of her unchaste conduct, unless such particular instances of unchastity show a criminal connection with the accused himself.

INQUIRIES AS TO BAD CHARACTER FOR CHASTITY, in cases both civil and criminal, where the character is regarded as involved in the issue, are limited to the time previous to the transaction in question.

WITNESSES CALLED TO IMPEACH CHARACTER OF PROSECUTRIX FOR CHASTITY, UPON TRIAL FOR RAPE, must confine their testimony to what they knew before the offense was committed. They will not be permitted to testify to any knowledge acquired afterwards.

PERSONS EXEMPTED FROM SERVICE AS JURORS ARE NOT THEREBY DISQUALIFIED TO SERVE ON JURY; and a verdict will not be set aside because a person so exempted was one of the jury.

INDICTMENT for rape, alleged to have been committed on September 2, 1860. The prisoner Forshner offered evidence

in regard to the character of the prosecutrix for chastity; but the court required the witnesses to confine their testimony to what they knew of her character prior to September 2, 1860. Respondent excepted. After the verdict was rendered, and before judgment, it appeared that one of the jurors was an ordained minister, but that fact was not known to respondent or his counsel until after the verdict was rendered. Respondent moved for a new trial, or that judgment be arrested, on both the above grounds. The court refused, rendered judgment, and allowed a bill of exceptions.

Blair, solicitor, for the state.

H. Bingham, for the respondent.

By Court, BELL, C. J. In criminal prosecutions, the charge of rape, or of an assault with intent to commit a rape, is considered as involving, not only the general character of the prosecutrix for chastity, but the particular facts of her previous criminal connection with the prisoner, though not with other persons. The character of the prosecutrix for chastity may therefore be impeached by general evidence of her reputation in that respect, but not by evidence of particular instances of unchastity. Nor can she be interrogated as to a criminal connection with any other person, except as to her previous intercourse with the prisoner himself; nor is evidence of such previous instances admissible: 3 Greenl. Ev., secs. 54, 214; 1 Phill. Ev. 468; 2 Archbold's Crim. Pl., Waterman's ed., 37; Roscoe's Crim. Ev. 95, and authorities there cited.

In cases where the character of the witness for truth is in question, the point of inquiry is, whether, when he takes his place upon the stand to testify, he has such a character as entitles his statements to be believed. It is therefore held in *State v. Howard*, 9 N. H. 485, and *Hoit v. Moulton*, 21 Id. 586, that those inquiries relate to the time of the examination, and are not limited to the time at and before the transaction in question. But in the case of an indictment for rape, the question is not what is the character of the witness for chastity now, for that inquiry is not admissible to affect the general credibility of the witness: *Jackson v. Lewis*, 13 Johns. 504; *Commonwealth v. Churchill*, 11 Met. 538 [45 Am. Dec. 229]; *Spears v. Forrest*, 15 Vt. 435; *Bakeman v. Rose*, 18 Wend. 146; *Frye v. Bank of Illinois*, 11 Ill. 367; *Hoit v. Moulton*, 21 N. H. 586; and it has no possible bearing upon the question whether the witness consented, or was forced to submit at a former time. A state

of facts proved to have once existed is presumed to continue, unless some reason is shown for doubt. But the reverse is not true. The bad character a person may have now is not assumed to have always existed, nor to have existed at any previous time. The inquiries as to bad character for chastity, in cases both civil and criminal, where the character is regarded as involved in the issue, are limited to the time previous to the transaction in question: *Rex v. Clarke*, 2 Stark. 241; *People v. Abbot*, 19 Wend. 192; *Boynston v. Kellogg*, 3 Mass. 189 [3 Dec. 122]; 3 Stark. Ev. 1269; 1 Phill. Ev. 489; 3 Greenl. Ev., sec. 54.

The court held that the witnesses called to impeach the character of the prosecutrix for chastity, upon a trial for rape, must confine themselves to what they knew in regard to her character before the offense charged, and not speak of their knowledge afterward acquired. It is strenuously insisted that this ruling was incorrect. But we think the principle is settled in *Douglass v. Tousey*, 2 Wend. 352 [20 Am. Dec. 616], cited for the state. "One of the witnesses of the defendant went to the former residence of the plaintiff to learn her character, and to subpoena witnesses to prove such character while she resided at that place; and the defendant offered to prove by him that he learned there that her character was bad. The general character, says Marcy, J., is the estimation in which a person is held in the community where he has resided, and ordinarily the members of that community are the only proper witnesses to testify as to such character. It would be unsafe to rely upon the testimony of the defendant's agent, sent into that community, an entire stranger, it may be, to collect information to subserve the plaintiff's views in the suit. Such witness would not speak his own knowledge of the plaintiff's character, or give his own opinion in relation thereto, but barely state his own conclusion upon the information received from others. This would be hearsay, and nothing more."

Where the present character is in question, what the party has heard said by others living near the witness is a means of judging of the present state of public opinion. But when the question is of the character of the witness at a former date, and the witness knows nothing personally of the estimate of the community at that time, he must speak either of what he has heard, which is mere hearsay, or of his conclusions from what he has heard related by others, which is still less reliable. The tendency of the admission of such evidence to induce

attempts to destroy the character of a prosecutrix, in order to defeat the prosecution, is obvious and most dangerous. We entertain no doubt, therefore, that the evidence was properly restricted by the court.

By the revised statutes (c. 176, sec. 3), "ordained ministers," among others, "are exempted from serving on juries, and their names shall not be placed on said lists of jurors." This provision creates no personal disqualification of the persons enumerated to serve on the jury; but its operation is to give to them an exemption from the duty, of which they may avail themselves if they think proper. It is no cause for setting aside a verdict that a person thus exempted has served on the jury without the knowledge of the party against whom the verdict is found. This was so held in the recent case of *Munroe v. Brigham*, 19 Pick. 368, upon a statute closely resembling our own, and is well supported by earlier authorities; *Bac. Abr.*, tit. Juries, E, 6; *King v. Sutton*, 8 Barn. & Cress. 417; *Regina v. Sullivan*, 8 Ad. & El. 831; *Amherst v. Hadley*, 1 Pick. 38; *Davis v. People*, 19 Ill. 74.

By the force of the term "exempted," we understand the party without the exemption would be liable to perform the duty. A person disqualified, and therefore incompetent and incapable, cannot be exempted from a duty or service, when the law imposes no such duty or service upon him. Such an exemption is a personal privilege with which the parties to the cause have no concern, and which furnishes them no cause of challenge, though the court, upon the suggestion made from any quarter, that a person returned as a juror was exempted, would ordinarily decline to hold him to a duty to which he is not liable, and would, of course, excuse him.

Exceptions overruled.

WITNESS MAY BE IMPEACHED BY EVIDENCE OF HIS GENERAL CHARACTER, but not of his conduct in particular cases: See notes to *Stanton v. Parker*, 39 Am. Dec. 529; *Commonwealth v. Churchill*, 45 Id. 230.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: In rape cases, evidence of previous acts of unchastity with other men is not admissible: *State v. Knapp*, 45 N. H. 154. Upon motion for a new trial, a cause for exemption does not disqualify a grand juror: *State v. Easter*, 30 Ohio St. 545. In rape cases, evidence of criminal intercourse between the prosecutrix and a person other than the defendant is admissible for purposes of impeachment; but evidence of particular facts from which such intercourse may be inferred is not admissible, though they might tend to show that such intercourse was probable: *Strang v. People*, 24 Mich. 7.

WAITT v. THOMPSON.

[48 NEW HAMPSHIRE, 161.]

ATTACHMENT OF PROPERTY ON MESNE PROCESS IS NOT DISSOLVED BY DEATH of the debtor after judgment and before the sale of such property. And if the estate were decreed to be administered as insolvent, after the death of the debtor, and before such sale, or demand made of the receiptor within thirty days after judgment, where the property has been receipted for, it is questionable whether it would alter the case.

WHERE DEFENDANT IN ATTACHMENT DIES AFTER JUDGMENT, ONE WHO HAS RECEIPTED for the attached property will be liable for it if a demand is made upon him for it within thirty days after judgment, even though the debtor dies before such demand.

IF ONE WHO HAS RECEIPTED FOR ATTACHED PROPERTY ALLOWS IT TO GO BACK INTO, or to remain in, the hands of the debtor, and the latter sells it, the receiptor is liable. Having intrusted the property to the debtor, he will be responsible to the sheriff for the debtor's acts.

TROVER for certain horses, sheep, oats, wool, and cattle. The property had been attached by the plaintiff, as deputy sheriff, in September, 1860, upon a writ in favor of J. Brown against J. C. Thompson, and receipted for by the defendants, G. W. Thompson and H. S. Clay. Judgment was rendered in the suit of *Brown v. Thompson*, on March 5, 1861, and execution was issued March 14, 1861. J. C. Thompson died March 12, 1861, and his estate was, in July, 1861, decreed insolvent. The execution in the suit of *Brown v. Thompson* was placed in the hands of plaintiff, who, on March 20, 1861, demanded the property attached of the defendants. All of the attached property remained in the possession of J. C. Thompson at the time of his death, except the oats and wool, and one of the young cattle, which he had sold. None of the property ever came into the hands of the ones who had receipted for it.

J. M. Shirley, for the plaintiff.

George, Foster, and Sanborn, for the defendants.

By Court, **SARGENT, J.** Under the old statute of 1822 (Laws 1830, 364), it is provided that all demands against an insolvent estate exhibited to the commissioners and rejected by them, and not prosecuted to judgment in the manner by this act prescribed, and all demands against such estate which by virtue of this act might have been exhibited and allowed by them, but which were not exhibited and allowed, shall be forever barred. And if any action be commenced against the executor or administrator of such estate, it shall be discontinued when the estate is represented insolvent.

Under this provision, it was held in *Clindenin v. Allen*, 4 N. H. 385, that any suit pending at the time of the decree of insolvency, whether against the deceased debtor or his administrator, must be discontinued, and the claim must be proved before the commissioners.

In the act of 1829 (Laws 1830, 96, secs. 22, 24), it was provided that in all cases where any party shall die, and the cause of action by law survives, the action shall not abate, but may be prosecuted by or against the executors or administrators, and that the attachment made on the original writ shall in such case be and remain good in the same manner as though such party had not died.

The former provision rendered it necessary that all actions pending against insolvent estates should be discontinued; and this latter provision was made for other cases where the cause of action survived, and where the estate was not administered as insolvent.

In the revision of our statutes in 1842, there was no change made or intended in the law as it existed before, except that it is declared that the attachment shall be dissolved where the debtor's estate is decreed to be administered as an insolvent estate, but not otherwise, if the cause of action by law survives. That provision evidently applies to actions pending at the decease of the defendant, but does not apply to cases where judgment was rendered before the decease. And the provision that was added, and which did not appear in the former statute (that in case of the death and insolvency of the defendant during the pendency of the suit, the attachment should be dissolved), was only making the statute say what it had before been held to mean.

For in *Bowman v. Stark*, 6 N. H. 461, it was held that an attachment is not dissolved by the death of the debtor after judgment, although he may die insolvent. And in the same case it is held that under the law as it was before the revised statutes, in case of the decease and insolvency of the debtor pending the suit, the suit must be discontinued, and that thereby the attachment was dissolved, thus showing that the law was settled to be the same before the revision as it was there declared to be. The other provisions of the statute relating to this general subject remain substantially as they were before the revision: R. S., c. 161, sec. 8; Comp. Stat. 410; R. S., c. 184, sec. 31; Comp. Stat. 473.

But section 33, chapter 184, of the revised statutes (Comp.

Stats. 473), provides that "property attached shall be held until the expiration of thirty days from the time of rendering such judgment in the action in favor of the plaintiff, that execution may issue thereon;" and this provision is substantially the same as existed before the revision: Laws 1830, 94.

It was by virtue of this provision that it was decided in *Bowman v. Stark*, 6 N. H. 461, that an attachment is not dissolved where the debtor dies after judgment, even though insolvent. And in *Smith v. Brown*, 14 Id. 67, it was held that an attachment creates a perfect lien, by the rendition of judgment against the defendant before his discharge in bankruptcy.

Grosvenor v. Gold, 9 Mass. 209, was a case analogous, in many particulars, to the present case. The provisions of their statute were similar to those of our present statute; that the attachment should be void after the death of the debtor, where the estate was represented as insolvent. And it was there held that goods attached on mesne process may be lawfully sold by the sheriff, on execution, the judgment debtor dying insolvent after the rendition of judgment, and before the sale. And the reason assigned was, that during the thirty days while the goods were held there was no representation or commission of insolvency, and the enacting clause (which provides that goods attached on mesne process shall be held for thirty days after judgment, etc.) was left free to operate.

So in this case, there was no representation or commission of insolvency within thirty days after judgment, during which the property was held by the attachment; and the case finds that, within the thirty days after judgment, the property was demanded of the receiptors by the proper officer, and that they did not deliver any of said property to him. That fixes the liability of the receiptors. And it may be questionable whether, if the estate had been decreed insolvent before the demand, it would have changed the result: *Miller v. Williams*, 30 Vt. 386. The receiptors might have taken the property attached, and have delivered it to the officer when demanded, or they might have procured the officer to go and take the property, and they would not have been liable to the administrator. The case finds that all the property was in the hands of the debtor at the time of his death, except the oats, wool, and one of the young cattle, so that the receiptors might have discharged their liability for all but the missing property, unless it should be held that the valuation in the receipt is an entire valuation, and that a part of the property could not be

delivered by them without the whole, which would not probably be the case here. But that question does not arise, as the receiptors did not offer but refused to deliver any part of the property demanded. They are equally liable for what the debtor sold as for the rest. They should have looked after the property in his hands, and prevented the sale, unless they intended to be bound by it. They intrusted the property to him, and must be held responsible for the whole. Whether these receiptors can now take the property that remains in the hands of the administrator, as they might have done at the time of the demand, and present their claim for what was sold against the estate, or whether the rights of creditors have now intervened, so as to compel these receiptors to present their whole claim to the commissioner of insolvency, and take their distributive share with the other creditors, is a question not raised in the case.

Judgment for the plaintiff.

DEATH OF DEFENDANT DESTROYS LIEN OF ATTACHMENT: See *Sweringer v. Eberius's Adm'r*, 38 Am. Dec. 463, and note thereto 465; note to *Franklin Bank v. Bachelder*, 39 Id. 610.

LIABILITY OF RECEIPTOR FOR ATTACHED GOODS: See *Pettes v. Marsh*, 40 Am. Dec. 689.

DISSOLUTION OF ATTACHMENT BY DEATH.—This question is considered in *Sweringer v. Eberius's Adm'r*, 7 Mo. 421, S. C., 38 Am. Dec. 463, and in the note to *Franklin Bank v. Bachelder*, 39 Id. 610, which discusses the origin and general nature of attachment liens. The decisions on this subject are few, and mostly so connected with local statutes as to have little general applicability. That an attachment is dissolved by the death of the defendant before judgment or sale of the property, and that the attachment lien is destroyed thereby, see note referred to, *supra*, and cases therein cited: *Lipscomb v. McClellan*, 72 Ala. 158; *Phillips v. Ash's Heirs and Adm'rs*, 63 Id. 414; *Myers v. Mott*, 29 Cal. 367; *Vaughn v. Sturtevant*, 7 R. I. 372; *Hensley v. Morgan*, 47 Cal. 622; *Ridlon v. Cressy*, 65 Me. 128; *Dwyer v. Benedict*, 12 R. I. 459. The case last cited shows that an order made for the sale of personalty attached on mesne process is dissolved by the death of the defendant owner before the sale is effected. And in *Upham v. Dodge*, 11 Id. 621, it is held that an attachment bond is vacated by the death of the defendant before final judgment against him in the action in which the bond is given. On the other hand, a number of cases hold that the death of the defendant before judgment, in an attachment suit, does not dissolve the attachment, or destroy the attachment lien: See *Frellson v. Green*, 19 Ark. 376; *Holman v. Fisher*, 49 Miss. 472; *Dyson v. Baker*, 54 Id. 24; *White v. Heavenner*, 7 W. Va. 324; *Loubat v. Kipp*, 9 Fla. 60; *More v. Thayer*, 10 Barb. 258; S. C., 6 How. Pr. 47; *Thacher v. Bancroft*, 15 Abb. Pr. 243; *Lord v. Allen*, 34 Iowa, 281; *Green v. Shaver*, 22 Tenn. 139; *Perkins's Heirs v. Norvell*, 25 Id. 151; *Boyd v. Roberts*, 10 Heisk. 474. This rule, however, is founded mostly on statute, and prevails now even in Missouri. There the statute provides that if the defendant in an attach-

ment cause die after the levy of the writ, the suit shall not be dismissed, nor the lien of the attachment destroyed, but the executor or administrator shall be made a party, and the suit shall proceed to final judgment in like manner as if the defendant were living. No execution, however, can issue on such judgment requiring the sale of any property or effects attached, but the same must be certified to the probate court for payment under the administration law: *Kenrick v. Huff*, 71 Mo. 573. The present rule in Missouri will, therefore, be observed to be different from what it was decided to be in *Sweringen v. Eberus's Adm'r*, 7 Id. 421; S. C., 38 Am. Dec. 463; and in the other Missouri case, cited in the note to *Franklin Bank v. Bachelder*, 39 Id. 610, cited *supra*. In Florida, where an attachment was levied upon the real estate of an absent debtor, and he died pending the suit and before final judgment, it was held that, in a contest between a mortgagee—seeking to foreclose a mortgage on the same property, which was executed after the date of the levy—and the purchaser under the judgment obtained in the same suit against the administrator, the lien of the attachment survived, and that the purchaser would be protected in his title: *Loubat v. Kipp*, 9 Fla. 61. In *Lord v. Allen*, 34 Iowa, 281, cited above, the decision was confined to personal property alone. So in Alabama, while it held that, when an attachment is levied on lands, and the defendant dies before judgment, the lien created by the levy is thereby destroyed; and though the action may be revived, and prosecuted to judgment against his personal representatives, the lien is gone, and the revivor does not affect the rights of heirs or devisees: *Phillips v. Ash's Heirs and Adm'rs*, 63 Ala. 414; *Lipscomb v. McClellan*, 72 Id. 151; yet the effect of a levy on real estate is held to differ materially from a levy on personal property. In a levy on real estate, "no estate, or interest, passes to the officer, or to the plaintiff; no right to the possession, or to take the rents, issues, or profits. The possession, and right of possession, remain in the defendant, undisturbed. A lien is created by the levy, superior to subsequent liens, alienations, or incumbrances, which will be available to the creditor, if he obtains judgment, to which the real estate can be made subject by process issuing upon it. . . . The death of the defendant, after the levy of the attachment on personal property, causes a temporary suspension or abatement of the suit, which must be cured by a revivor against his personal representative. The title to all personal property of a deceased person devolves, by operation of law, on his personal representative. Death works a change of parties to the suit, but, of itself, does not dissolve the attachment, or impair its lien on personal property. For when the revivor is had against the personal representative, there is before the court the party having the title; and if judgment is rendered against him, it operates directly on the property; and a *venditioni exponas*, or a *fieri facias*, may be issued upon it, under which a sale may be made for the satisfaction of the judgment. . . . But the death of the defendant, *pendente lite*, of necessity works a loss of the lien created by the levy of the attachment on real estate. If he dies intestate, the lands descend immediately to his heirs; or if he dies testate, they pass to his devisees. The personal representative takes no estate or interest in them, and a judgment against him will not bind them. No other than real actions, under our statutes, are capable of revivor for or against heirs or devisees. As the title resides in them, and they cannot be made parties, no judgment can be rendered by which they are to be divested of their estate, though the levy created a lien, continuing during the life of the ancestor. This is the frailty and uncertainty of the lien, as the statutes have created it:" *Phillips v. Ash's Heirs and Adm'rs*, 63 Ala. 416, 417; *McClellan v. Lipscomb*, 56 Id. 255.

It is clear, therefore, that in Alabama, when an attachment is levied on personal property, the death of the defendant before judgment does not destroy the lien, nor dissolve the attachment: *McClellan v. Lipscomb*, *supra*; *Phillips v. Ash's Heirs and Adm'rs*, 63 Id. 416; *Woolfolk v. Ingram*, 53 Id. 11; and that this is true in Iowa: *Lord v. Allen*, 34 Iowa, 281; but that in Alabama, when an attachment is levied on lands, the death of the defendant before judgment dissolves the attachment, and destroys the lien: *McClellan v. Lipscomb*, 56 Ala. 255; *Phillips v. Ash's Heirs and Admr's*, 63 Id. 414; *Lipscomb v. McClellan*, 72 Id. 151. But even in Alabama, where an attachment has been levied on personal property, and the defendant dies before judgment, the lien is lost, if the estate of the defendant has been judicially declared insolvent: *Woolfolk v. Ingram*, 53 Id. 11; *Phillips v. Ash's Heirs and Adm'rs*, 63 Id. 417. "It is the insolvency which takes away the right to execution, and transmits to the court of probate exclusive jurisdiction to marshal and distribute the assets of the decedent, and of the debts and claims chargeable on the assets:" *Woolfolk v. Ingram*, 53 Id. 16; *Willard v. Whitney*, 49 Me. 235; *Ridlon v. Cressy*, 65 Id. 128. In Maine, an attachment of real estate is dissolved by the death of the debtor and a decree of insolvency: *Ridlon v. Cressy*, *supra*; but in Tennessee the statutes of distribution of insolvent estates do not affect the liens acquired upon a decedent's property previous to his death, by the levy of an attachment, any more than liens by judgment and execution: *Boyd v. Roberts*, 10 Heisk. 476; *Fields v. Creditors of Wheatley*, 33 Tenn. 351. In Missouri, if a creditor causes property of his debtor to be attached, sufficient in value to pay the debt, and the property is lost pending the litigation, through the insolvency of the officer in whose custody it is left and his sureties, the creditor cannot afterward enforce his demand against other property of the debtor. And if the debtor die pending the litigation, the fact that the property attached might have been taken, notwithstanding the attachment, to pay the funeral expenses, expenses of the last illness, and the allowance to the widow, will not change the rule: *Kenrick v. Huff*, 71 Mo. 570. All of the cases hold, however, that if judgment is recovered before the death of the defendant, the attachment lien may, upon his decease, be enforced against the property charged therewith: *Fitch v. Ross*, 4 Serg. & R. 556; *Miller v. Williams*, 30 Vt. 386; and this though he die insolvent: *Bowman v. Stark*, 6 N. H. 459; *Grosvenor v. Gold*, 9 Mass. 208.

In some of those states where the death of the defendant before judgment does not dissolve the attachment or destroy the lien, it is necessary, where the defendant dies before judgment, to revive the suit against his personal representatives, and if the property be land, against his heirs, before the land can be condemned to be sold. The attached property can only be subjected to the lien by first exhausting the personal assets, and bringing the heirs before the court, both of which may be done by *scire facias* first against the personal representative, and then against the heirs: *Perkins's Heirs v. Norrell*, 25 Tenn. 151; *Green v. Shaver*, 22 Id. 138; *Frellson v. Green*, 19 Ark. 378; and compare *Phillips v. Ash's Heirs and Adm'rs*, 63 Ala. 416. In such states, the attaching creditor is held to have secured by the attachment a positive, specific lien upon the property of the defendant, equivalent to the lien of a judgment or execution in its binding force; and that upon the death of an attachment debtor, *pendente lite*, the property goes to his personal representatives charged with the lien; and consequently, if the cause of action survives, the action may be continued in the name of the executors, and the lien enforced upon the recovery of judgment by the sale of the property attached: See cases cited above, to the point that death does not dis-

solve the attachment, etc. It is well established that an attachment is a lien of such a fixed and positive nature "as to withstand the power of the bankruptcy act:" *Davenport v. Tilton*, 10 Met. 327; *Ingraham v. Phillips*, 1 Day, 117; *Vreeland v. Bruen*, 21 N. J. L. 214; *Wells v. Brander*, 10 Sinecl. & M. 348; *Peck v. Jenness*, 7 How. 612; *Kittredge v. Warren*, 14 N. H. 509; *Kittredge v. Emerson*, 15 Id. 227; *Buffum v. Seaver*, 16 Id. 160; *Rowell's Case*, 21 Vt. 620; *Franklin Bank v. Bachelier*, 23 Me. 60; S. C., 39 Am. Dec. 601; *contra: Foster's Case*, 2 Story, 131; *Bellores' and Peck's Case*, 3 Id. 428; *Fisher v. Vose*, 3 Rob. (La.) 457; S. C., 38 Am. Dec. 243; and it would seem, upon principle, that this is the correct rule to apply in cases of attachment where the defendant dies before judgment. We have seen that it has been so applied; but that in other cases, the attachment is dissolved by the death of the defendant, and that the attached property passes into the hands of the administrator. This last proposition has been applied in Pennsylvania to the case of foreign attachments: *Fitch v. Ross*, 4 Serg. & R. 557; and also in the United States circuit court for the District of Columbia: *Pancost v. Washington*, 5 Cranch C. C. 507. The only design, however, of a foreign attachment is to produce the defendant in court. As that object is defeated by his death, the attachment, being powerless to produce the required results, is dissolved. This rule does not therefore, in principle, conflict with what we have thought to be the correct rule. But whether the attachment levied prior to the death of defendant is such a specific lien upon the property attached that it will hold it to answer the judgment obtained against the personal representatives, substituted as defendants in the main suit, is the disputed point, and its determination must depend upon the statutes of the state, not only in reference to attachments, but to those governing the settlement of decedents' estates as well. In *Myers v. Mott*, 29 Cal. 359, 367, the supreme court of California considered this question, and were nearly evenly divided in opinion. It was there held by the majority that the death of defendant prior to judgment destroyed the lien. Rhodes, J., expressed the reasons for thus holding as follows: "No property may be taken in attachment that is not liable to seizure under the execution when issued; and the only way in which the levying of the attachment upon the property operates as security for the satisfaction of the anticipated judgment, is by its capacity to hold the property to await the execution to be issued. . . . When the action is of such a character, or when its condition has become such, by reason of a change of parties or other cause, that a judgment *in personam* cannot be rendered against the defendant, an execution in the usual form, commanding the sheriff to satisfy the judgment by a seizure and sale of the personal and real property of the defendant, is not authorized to be issued. A personal judgment against the administratrix in this case was not the kind of judgment, as we have seen, that the statute required or permitted, but it should have been that the amount ascertained to be due to the plaintiff be paid by the administratrix in due course of administration. A payment in the due course of administration means the payment by the legal representative of the deceased, acting under the orders of the probate court, out of the assets of the estate of the deceased, and in the manner and order that other debts of the same rank are by the probate act required to be paid. . . . It necessarily results, from these statutory provisions and legal principles defining the character and purpose of the attachment lien and the mode of its enforcement, that whenever the case is such that a judgment cannot be legally rendered, that will authorize an execution against the personal and real property of the defendant, the attachment lien at once ceases." But Sawyer, J., in one of the dissenting opinions,

says: "The moment the attachment is levied, a lien upon the property attached is acquired. The lien becomes specific, and the party acquires a right to have any amount that may be found due upon the contract satisfied out of the specific property. It is a right vested upon the conditions prescribed by the statute. The law favors the diligent, and not those who sleep on their rights. The plaintiff incurred the costs of a suit to secure the right given by the statute, and by this means acquired for 'himself, to the exclusion of all others, the statutory lien on the defendant's property, and a right to be first paid out of its proceeds. This right became vested, and being once vested, should not be divested, unless by virtue of some express statutory provision, or by necessary implication from provisions bearing upon the subject-matter. I have not found any express provision of the statute to the effect that the attachment shall be dissolved by the death of the defendant before judgment. If any such result can be deduced from the various statutes, it must be by remote, and not very apparent or satisfactory, inferences." See page 375. And this seems to be the better reasoning. The strength and value of an attachment lien is also considered in *Hannahs v. Felt*, 15 Iowa, 144, where it is said that such a lien is as specific as if acquired by the voluntary act of the debtor, and stands on as high equitable ground as a mortgage. The actual service or levy of an attachment upon property creates a real lien thereon, which nothing subsequent can destroy but the dissolution of the attachment: *Lord v. Allen*, 34 Id. 283. For similar views respecting the strength of an attachment lien, where defendant dies before judgment, see *Boyd v. Roberts*, 10 Heisk. 474; *Snell v. Allen*, 31 Tenn. 208; *Frellson v. Green*, 19 Ark. 376; *Thacher v. Bancroft*, 15 Abb. Pr. 243. In *Hervey v. Champion*, 30 Tenn. 569, it is held that the lien of an attachment has the same effect, both at law and in equity, as judgment and execution liens.

Whatever diversity of views may exist as to the effect, upon a pending attachment, of the death of the defendant, there can be no doubt that a suit by attachment, commenced after the death of the defendant, is utterly void, and therefore that no attachment of property or proceeding by garnishment in suit, or a levy thereunder, can have any validity whatever: *Loring v. Folger*, 7 Gray, 505. The same views which would abate or dissolve an attachment upon the death of a person will produce a like result in the case of the civil death of a corporation: *Bowker v. Hill*, 60 Me. 174; *Farmers' and M. Bank v. Little*, 8 Watts & S. 207; S. C., 42 Am. Dec. 293; *Paschall v. Whitsett*, 11 Ala. 472. In *Lindell v. Benton*, 6 Mo. 361, it was held that the civil death of a corporation, after the garnishment of its debtor, did not prevent the subjection of the garnishee to liability. The death of a garnishee, however, after his answer, arrests all proceedings as to him, and a judgment rendered against him then is erroneous. Though the garnishee's death will have no effect upon the main action, yet no further proceeding can be had except against his personal representative; which may be done by *scire facias* if no other statutory mode be prescribed. If the garnishee, at his death, had in his hands specific chattels belonging to the defendant, which go into the hands of his representative, the court may compel them to be delivered up for application to the plaintiff's judgment when recovered: *Parker v. Parker*, 2 Hill (S. C.), 35. A judgment *de bonis testatoris* against an executor as garnishee binds neither the testator's estate nor the executor personally: *Bickle v. Chrisman's Adm'x*, 76 Va. 678.

WEYMOUTH v. SANBORN.

[48 NEW HAMPSHIRE, 171.]

COURT WILL LOOK BEHIND FORM OF SECURITY to ascertain real nature of debt.

PROMISSORY NOTE GIVEN FOR PRECEDENT DEBT IS NOT PAYMENT OF IT, but is a mere security. The note is simply evidence of the debt.

PROMISSORY NOTE GIVEN FOR LABOR DOES NOT CHANGE CHARACTER OF CLAIM, and the "claim for labor" is still within the exception of section 5 of the homestead act.

PROFESSIONAL SERVICES OF PHYSICIAN DO NOT CONSTITUTE "CLAIM FOR LABOR," within the meaning of section 5 of the homestead act of New Hampshire.

PROMISSORY NOTE EXECUTED BY DEBTOR AND HIS WIFE IS NOT RELEASE OR WAIVER OF EXEMPTION under the homestead act of New Hampshire, where no mortgage of the homestead is executed by them to secure such note.

WRIT of entry for premises set off to plaintiff upon an execution against the defendant. The defendant and his wife claimed the same as a part of their homestead. The declaration had only common counts for money had and received, and labor done and performed. Other facts are stated in the opinion, and it was agreed that such judgment should be rendered as the facts would warrant.

Shirley, for the plaintiff.

Rogers and Butterfield, for the defendant.

By Court, BELLOWS, J. It appeared that the original debt was for services as a physician, and for that a note was given, signed by both husband and wife. Upon this note, a suit was brought against the husband alone, and judgment obtained for the amount; and the execution has been extended upon the homestead, although a demand was duly made upon the officer to set it out according to the statute.

One question that arises is, whether the character of the claim is changed by the giving of the note; that is, whether it is still to be regarded as a claim for labor within the fifth section of the homestead act, or not. As a general principle, the court will look behind the form of the security, and ascertain the real nature of the debt, and decide according to that. Therefore it is held that the taking up a note secured by a mortgage, by giving a new one for the same sum, is no discharge of the mortgage: *Elliott v. Sleeper*, 2 N. H. 525; *New Hampshire Bank v. Willard*, 10 Id. 210; *Williams v. Little*, 12 Id. 31. Nor will the giving of a note for the balance due an

attorney on account discharge his lien on the papers: *Dennett v. Cutts*, 11 Id. 163. Neither will the giving of a note for the price of goods sold discharge the vendor's lien: *Clark v. Draper*, 19 Id. 419. So upon the same principle it has been held that the individual liability of a stockholder for the debt of a corporation is not discharged by the giving of the note of the corporation after such stockholder had ceased to be a member: *Freeland v. McCullough*, 1 Denio, 414, 426 [43 Am. Dec. 685]. In these cases, it is considered that the promissory note of the debtor, given for a precedent debt, is not a payment of it, but mere security; that the debt is the substantial thing, and the note the evidence of it; and we can see no reason why these principles should not be applied to the case before us. It partakes, indeed, very much of the character, in respect to the question under consideration, of liens, whether created by the act of the parties, as in the case of mortgages, or by operation of law, as liens of mechanics or attorneys; and there is nothing in the nature of the case or the provisions of the law that requires a different rule. In Pennsylvania, this principle is applied to cases under the homestead exemption law: *Reed v. Defebaugh*, 24 Pa. St. 495; *Weaver's Estate*, 25 Id. 434. In the latter case, the creditor held the promissory note of his debtor, given prior to July 4, 1849; and after the passage of the homestead act, a new note was given for the old one, and a judgment rendered upon it; and it was held that this change did not make the debt subject to the homestead exemption. And so is the case of *Reed v. Defebaugh*, 24 Id. 495, substantially.

The plaintiff's claim, then, is to be regarded as a claim for services as a physician, and the question is, whether it is excepted as a claim for labor. By section 5 of the homestead act, it is provided that the exemption shall not extend to "any claim for labor less than one hundred dollars," and this involves the inquiry as to the meaning of the term, "claim for labor." The purpose of the act was to protect from attachment and execution a comfortable family homestead, but of such moderate value as would not interfere with the just rights of creditors, excepting, however, from its operation, a class of creditors whose claims, in the judgment of the legislature, ought not to be postponed for the object of providing a home, even of such moderate value; and among them are claims for labor less than one hundred dollars. The common and ordinary signification of the term "labor" accords, we think, with

the definition given by the best lexicographers, and is understood to be physical toil. And the term "laborer" is ordinarily employed to denote one who subsists by physical toil, in distinction from one who subsists by professional skill. The exception of claims for labor would not, therefore, ordinarily be understood to embrace the services of the clergyman, physician, lawyer, commission merchant, or salaried officer, agent, railroad and other contractors, but would be confined to claims arising out of services where physical toil was the main ingredient, although directed and made more valuable by mechanical skill. On the other hand, there is a technical use of the term in pleading, which has a much wider signification, and would embrace all sorts of services, whether physical or mental, or whether the main ingredient was manual toil, or professional or other skill. It would embrace, indeed, all the classes we have mentioned, including the highest salaried officers, engineers, architects, sculptors, painters, stage-players, master-builders, or other contractors. And it becomes necessary to determine in which sense it was used in the law under consideration.

It will be observed that, in every form of useful labor, some degree of skill must enter; and so, in every application of skill, there must be some degree of physical labor. Unless, then, we adopt the most comprehensive signification, we must take it in its popular sense, as the only other that has been or can be suggested; and the question really is, Which of the two was intended?

In determining this question, the object of the exception should be considered; and we think its purpose was to protect a class of creditors whose means of support for themselves and families would be likely to depend upon the punctual payment of their wages, thus making a claim more urgent than the claim of the debtor to exempt the family homestead, though small in value. This is shown, both by the limitation on the value of the homestead, and in the amount of the claim excepted, as well as in the general object of the law; and we are constrained to think that the term "labor" was used in its primary and popular signification, restricted to claims arising from physical toil. Nor is there anything in the fact that, in pleading, the term has a broader meaning, that requires a different construction from the one we are disposed to give it. The act does not relate to courts, legal process, or pleading, or to any technical matter or subject, and there is nothing in it that indicates a technical use of the language.

We are at liberty, then, to gather the legislative intention from the policy of the law, the object sought to be obtained, as well as the ordinary meaning of the language used. The case of *Whitney v. Whitney*, 14 Mass. 88, is strongly in point. The question there was upon the construction of a statute which made all the real estate of a debtor liable for his debts. And it was held that, although the term "real estate" did not, strictly speaking, embrace remainders or reversions, yet as it was the policy of the law to charge the whole of a man's estate with the payment of his debts, and as the popular meaning of the term would include all but the personal estate, the law was construed to embrace remainders and reversions.

Our conclusion then is, that the language was used by the law-giver in its popular sense alone. We have not been able to find among the adjudged cases any authorities directly in point; but some light is thrown upon the subject by analogous cases arising under statutes creating mechanics' liens. In *Winder v. Caldwell*, 14 How. 434, where the statute created a lien upon all buildings erected in the city of Washington, for the payment of all debts for work done or materials found by any brick-maker, mason, carpenter, lumber merchant, etc., or any other person employed in furnishing materials for or in erecting or constructing such building, it was held that a master-builder, undertaker, or contractor, who had undertaken to erect a building, although he might be a carpenter, did not come within the policy of the act, which, as its title indicated, was "to secure mechanics and others payment for labor done and materials found." The court say that such persons have an opportunity and are capable of obtaining their own securities, and that they do not labor as mechanics, but superintend work done by others. It is obvious in that case that the terms of the statute were broad enough to embrace such master-builders; but it was held that such services are not to be regarded as work done within the act. So a lumber dealer, furnishing lumber to a contractor, was held not to be a person doing or performing work toward the erection of a building, although he had caused a portion of the lumber to be dressed at his mill in a particular way, by the order of the contractor: *Burst v. Jackson*, 10 Barb. 219. One who furnishes superintendence and skill is not entitled, in Pennsylvania, to a mechanic's lien: *Jones v. Shawhan*, 4 Watts & S. 257. So commissions for services in paying for labor and materials are not services for which the lien exists: *Edgar v. Salisbury*, 17

Mo. 271; 14 U. S. Dig. 416, sec. 27. A lien for labor in cutting and hauling logs and other lumber, for the amount agreed to be paid for personal services, does not include the use of a six-horse team, sleds, and rigging with which such logs, etc. were drawn: *Coburn v. Kerswell*, 35 Me. 126. So it is held that a mechanic who contracts to build a house has no lien on it for his own services in superintending his workmen: *Blakey v. Blakey*, 27 Mo. 39; see also *McCrillis v. Wilson*, 34 Me. 286 [56 Am. Dec. 655]; *Hoatz v. Patterson*, 5 Watts & S. 537; *Walker v. Anshutz*, 6 Id. 519; *Witman v. Walker*, 9 Id. 183.

From these cases, it would seem that, so far as we have any judicial construction of the term under consideration used in similar statutes, the distinction suggested by us has been recognized. In the class of cases cited, the statutes under consideration were designed to facilitate or secure the payment of certain claims for labor and material by a lien upon the buildings upon which they were bestowed. A similar purpose was designed to be effected by this exception to the provisions of our homestead act, and therefore the cases cited apply with greater force. We are aware of the decision in *Robinson v. Aiken*, 39 N. H. 211, where it is held that the official services of the mayor of a city, under an annual salary, must be regarded as "labor performed," within the meaning of the law relating to the trustee process. This decision was made in 1859, long after the passage of the homestead act, and therefore it cannot be said that the language used by the legislature in that act had at the time a known judicial construction in our own state; and we are not disposed to extend the doctrine of *Robinson v. Aiken*, *supra*, beyond the class of cases in which it was applied.

But it is urged that the claim in this case, being the note of the husband and wife, is excepted from the provisions of the homestead act; and by the terms of the fifth section, literally construed, it would appear to be so. But we are not inclined, however, to give it that construction. It was evidently the intention of the act to admit nothing as a release or waiver of the exemption but the explicit act of the husband and wife by deed executed with the formalities required for the conveyance of real estate; and it is difficult to see why the note of the husband and wife should have the effect of a release or waiver, or to see any reason for excepting such note from the operation of the act. It is clear that the separate notes of the husband and wife could have no such effect, and no good

reason can be assigned for giving a greater effect to their joint note. The fifth section, in which this exception was found, was somewhat carelessly drawn; and we think that what was intended to be excepted was the mortgage of the homestead itself, to secure the payment of a note, both of which were executed by the husband and wife. This construction will give effect to the provisions of the first section in relation to a release or waiver of the exemption, and will accord with the purpose of the act, and at the same time will do no violence to the language of this exception, as it is but changing the word "or" to "and," as suggested by the defendant's counsel.

There must, therefore, on the principle of *Fogg v. Fogg*, 40 N. H. 282 [77 Am. Dec. 715], be judgment for the defendant.

PROMISSORY NOTE GIVEN FOR PRECEDENT DEBT WILL NOT EXTINGUISH ORIGINAL CLAIM, unless there is an express agreement to receive the note as payment: *Berry v. Griffin*, 69 Am. Dec. 123, and cases cited in note to same 126; note to *Emanuel v. White*, Id. 387. But a pre-existing debt is a valuable and valid consideration for a promissory note: *Dixon v. Dixon*, 76 Id. 128.

THE PRINCIPAL CASE WAS REFERRED TO in *Hoyt v. White*, 46 N. H. 48, as one in which the term "labor," as used in the homestead act, had received a judicial consideration and construction; and in the same case, page 48, a reference was made to what is said in the principal one about what "claims for labor" ordinarily embrace. The above references were made by the court in discussing the distinction between the terms "personal services and earnings" and "labor," as used in the statute of New Hampshire, regulating the trustee process.

PERKINS v. TOWLE.

[43 NEW HAMPSHIRE, 220.]

EXEMPLARY DAMAGES MAY BE RECOVERED IN TRESPASS QUARE CLAUSUM FREGIT, if the facts would warrant such a recovery in any other form of action.

MALICE.—UNDER GENERAL ISSUE IN TRESPASS, everything directly connected with the acts complained of may be proved to show or to rebut malice.

IN TRESPASS, MATTERS NOT DIRECTLY CONNECTED WITH ACTS COMPLAINED OF CANNOT BE SHOWN. Thus in trespass for tearing down plaintiff's house, it is inadmissible to show, for the purpose of rebutting the presumption of malice, that the house was occupied by lewd women; that visitors entered over defendant's land, left the bars down, and disturbed a religious meeting, etc,

TRESPASS *quare clausum fregit*. Plaintiff owned a house occupied by lewd females, who were visited by profane and disorderly men, entering the premises over the land of one of the

defendants. Defendant requested plaintiff, the owner of the premises, to remove the nuisance. He did not do so. Defendants, eight in number, then entered the house, tore down the chimney and partitions, and removed some of the boards from the outside. Plaintiff brought trespass, and asked for exemplary damages. Defendants confessed forty dollars damage. The chief questions raised were whether exemplary damages could be recovered in trespass *quare clausum fregit*, and what testimony would be admissible in proof of malice, or to rebut the presumption of it. The points are sufficiently stated in the opinion.

George, Foster, and Sanborn, and Flint, for the plaintiff.

Morrison, Stanley, and Clark, for the defendants.

By Court, SARGENT, J. There were several other questions raised upon the trial in this case beside those above stated, but it is not deemed of consequence to report them.

That this house of the plaintiff was occupied by improper persons, and that it was visited by improper persons and at improper times, and for improper purposes, might have been proper evidence upon which to have obtained an indictment against the owner or the occupants. But it is not claimed as justification of the defendants' acts, and if no justification, it is no excuse.

These defendants knew that they went in violation of law, and in direct violation of the plaintiff's rights. They do not claim that they mistook the law, or that they honestly, though mistakenly, supposed that they had a right or any authority to do the acts complained of.

Because this plaintiff suffered his house to be thus occupied longer than suited the convenience of these defendants, and longer than was proper, according to their notions of propriety, either because he was not disposed or was unable to remove the inmates, did not justify or excuse them in an open and known violation of law, and in thus wantonly injuring the plaintiff and destroying his property. The evidence does not show that at the time of the trespass complained of these defendants were suffering any inconvenience from such occupation of the plaintiff's house, and if they were, mere inconvenience could be no excuse for these acts.

The evidence admitted in this case, in relation to what had happened prior to the acts complained of, was too remote, even to rebut the presumption of malice.

The defendants have pleaded guilty to the charge, by their confession, and that they are liable to pay all the actual damages which the plaintiff suffered by their acts, and they say that forty dollars covers that amount. But the plaintiff claims that his actual damages were more than that sum; and also, that he is entitled to exemplary damages; that the defendants should pay him something for the circumstances of insult to him, and of aggravation toward him, with which the acts were attended.

Now, in settling that question, all the circumstances and acts connected with and making parts of the transaction complained of are competent; and under this plea, nothing more than that: *Reed v. Bias*, 8 Watts & S. 189, was trespass for pulling down the plaintiff's house, which was tried on the general issue. It was held that the fact that the building was peaceably taken down and its materials preserved in conformity with the directions of the commissioners of the township, at a time when there was great public excitement and disorder, with a view of saving the neighborhood from threatened violence, was admissible in evidence in mitigation of damages, or as showing that the plaintiff should recover only his actual pecuniary loss or damage.

But it was held that evidence that the commissioners had by law the power to abate nuisances, when ascertained to be such, and that a grand jury, after instructions by a competent court, presented this building as a public nuisance and recommended its abatement, was not, under the issue, admissible for the same purpose.

So in an action for assault and battery, the defendant may give in evidence immediate provocations, such as happened at the time of the assault, but not such as had previously happened: *Avery v. Ray*, 1 Mass. 12.

So in the case at bar, all the acts and circumstances directly attendant upon the transaction complained of are competent for either party to show, as tending to favor or rebut the presumption of malice. But under this plea, that is the extent of the rule: 2 Greenl. Ev., sec. 274; *Brown v. Gordon*, 1 Gray, 182; *Sampson v. Henry*, 11 Pick. 379; *Hall v. Power*, 12 Met. 482 [46 Am. Dec. 698]; *Knight v. Foster*, 39 N. H. 576, and authorities cited.

The evidence on that point was therefore improperly admitted. But it is said that although this evidence was not competent, as tending to rebut the presumption of malice and

the claim for exemplary damages, yet that no such claim could legally be made in this case, because this was a trespass to real estate; and the defendants' counsel claim that it has never been held that vindictive or exemplary damages may be recovered for injuries to real estate.

We do not find the defendants' position on this point borne out by the authorities, although we find some expressions that seem to favor that view. In *Whipple v. Walpole*, 10 N. H. 132, it was said that the principle was established, that in actions for torts to the person and personal property, the jury may give exemplary damages, etc.; and similar expressions may be found in other authorities. But the rule of exemplary damages is not confined to that class of property or of cases.

Merest v. Harvey, 5 Taunt., 1 Eng. Com. L. 442, was trespass for breaking and entering the plaintiff's close, treading down his grass, and hunting for game. It appeared that the defendant refused to leave when notified, and used insulting language to the plaintiff. It was held that a verdict of five hundred pounds was not excessive damages. Gibbs, C. J., said: "I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages?" And Heath, J., said: "It goes to prevent the practice of dueling, if juries are permitted to punish insult by exemplary damages."

So in *Sears v. Lyons*, 2 Stark., 3 Eng. Com. L. 317, which was trespass for breaking and entering the plaintiff's close, and laying poison upon it with intent to destroy the plaintiff's poultry. It appeared in evidence that some of the plaintiff's poultry had died, but whether from eating the poisoned barley on the plaintiff's land did not appear. The jury gave fifty pounds damages. Abbott, J., charged the jury that for the trespass and entry into the house or lands of the plaintiff, they might consider not only the mere pecuniary damages sustained by the plaintiff, but also the intention with which the fact had been done, whether for insult or injury. So in *Tullidge v. Wade*, 3 Wils. 18; and in *Doe v. Filliter*, 13 Mee. & W. 47.

The same doctrine is held in *Bateman v. Goodyear*, 12 Conn. 580, and in *Treat v. Barber*, 7 Id. 279, in which Hanson, C. J., says: "The jury are not bound down to give the mere pecuniary loss sustained by the plaintiff, but may award damages for the malice and insult attending a trespass." And although that was trespass *de bonis asportatis*, yet it is evident, from the

connection in which the above remark was made, that it was intended to apply to trespass *quare clausum* as well.

In *Merrills v. Tariff M. Company*, 10 Conn. 384 [27 Am. Dec. 682], it was held that in an action on the case, exemplary damages might be recovered, as well as in trespass. Huntington, J., says: "If the owner of a well shall bring trespass against another for an entry on his land and putting into the well any poisonous or offensive substance, the jury would not be restricted, in awarding damages, to the actual pecuniary loss which the plaintiff may have sustained." And why should they be so restricted, should the plaintiff be a co-tenant with the defendant of the well, and bring an action on the case for a like injury, committed under like circumstances?

In *Major v. Pulliam*, 3 Dana, 584, it was held that in trespass *quare clausum fregit*, where malice, and vexatious and incidental wrongs, were proved, the jury may give any amount of damages, not exceeding that laid in the declaration, unless so excessive as to be obviously oppressive, or to evince corruption or vindictive passion on the part of the jury.

We do not mean to say that in this case any exemplary damages should or should not be recovered; nor do we intend by this decision to extend the doctrine of exemplary damages as held in this state; but we hold, simply, that exemplary damages may be recovered in an action of trespass *quare clausum fregit*, as well as in any other action, where there are such circumstances of aggravation, of insult, and of malice as would warrant such recovery.

A new trial granted.

RIGHT TO RECOVER EXEMPLARY DAMAGES is not confined to one form of action. They may be recovered in case as well as in trespass: *Hopkins v. Atlantic etc. R. R. Co.*, 72 Am. Dec. 287, and note 295.

EXEMPLARY DAMAGES IN TRESPASS, WHEN RECOVERABLE: See note to *Hite v. Long*, 18 Am. Dec. 726; *Batchelder v. Kelly*, 34 Id. 174; *Curtiss v. Hoyt*, 48 Id. 149; extended note to *Austin v. Wilson*, 50 Id. 767-775, on allowance of exemplary damages in general; extended note to *Merrills v. Tariff Mfg. Co.*, 27 Id. 684-689, on aggravation of damages to property.

CIRCUMSTANCES HAVING NO DIRECT CONNECTION WITH CASE should not be admitted as evidence: *Dupree v. State*, 73 Am. Dec. 422.

STATE v. BARTLETT.

[43 NEW HAMPSHIRE, 224.]

WHERE INSANITY IS SET UP AS DEFENSE TO INDICTMENT FOR CRIME, the jury ought not to return a verdict of guilty if they have a reasonable doubt as to the soundness of the prisoner's mind and his capacity to commit the crime.

ASSAULT to commit murder. Bartlett shot and wounded one Dicey. He was indicted for assault to commit murder. His defense, among others, was, that he was a monomaniac on the subject of his wife's infidelity, and that he imputed improper connection between her and the said Dicey. The jury found a verdict of guilty, and defendant appealed. The instructions on which the appeal was based appear in the opinion.

E. A. Hibbard, for the respondent.

Blair, solicitor, for the state.

By Court, BELLOWS, J. The defendant's counsel requested the court to charge the jury that if it was more probable that the prisoner was insane than otherwise, it was their duty to find him not guilty by reason of insanity; and also, that although the burden was on the prisoner to remove the natural presumption of sanity, the jury must be satisfied, beyond a reasonable doubt, that he was a sane man, or else acquit him.

But the court declined to charge the jury according to either request, unless it be found in the direction "that the jury must be satisfied of the existence of such malice at the time, beyond a reasonable doubt, in the prisoner, and that he had a sufficient degree of mental capacity or sanity to render him a fit subject of punishment, upon the principles before suggested."

If the term "beyond a reasonable doubt" could be applied to the finding of the jury in respect to the sanity of the prisoner, it must be regarded as a full compliance with both branches of the request; because, if his sanity was established beyond all reasonable doubt, there could be no ground to claim that he was probably insane. But we think the term "beyond a reasonable doubt" cannot be so applied, or at least not necessarily; and this is indicated by other parts of the charge, in which it is stated, in substance, that to overcome the presumption of sanity, it must be clearly proved that the prisoner was laboring under such a disease of mind as to render him unable to discriminate between right and wrong;

and again, that to find the act not criminal, they must be clearly satisfied that it was the result of the disease, and not of a mind capable of choosing. It must be taken, then, that the judge declined to charge the jury that it would be sufficient, if the prisoner's evidence rendered it more probable that he was insane than otherwise; or that they must be satisfied beyond a reasonable doubt that he was sane, and responsible for his acts. It must be taken, also, that evidence had been adduced tending to prove the prisoner's insanity; otherwise, there was no occasion to give any instructions upon the subject.

Upon this state of the case, two questions arise: 1. Is it enough that the proof should render the insanity more probable, than otherwise? 2. Ought the prisoner to be found guilty when, upon the whole evidence, there is a reasonable doubt of his sanity?

Upon a careful examination of the questions, both upon principle and authority, we are of the opinion that the jury ought not to return a verdict of guilty so long as a reasonable doubt rests in their minds of the prisoner's capacity to commit the offense charged; and this, of course, is an answer to both questions. Nor do we think it at all material whether the proof of insanity comes from the government or the accused, or part from each; but however adduced, it is incumbent upon the prosecutor to satisfy the jury beyond a reasonable doubt of the existence of all the elements, including the necessary soundness of mind, that constitute the offense. We are aware that there is conflict in the adjudged cases upon this subject, and that highly respectable authorities have maintained that when insanity is set up as a defense, the burden of proof is thrown upon the respondent by force of the natural presumption of sanity, and that he must establish his defense by a preponderating weight of evidence; and that some cases have even gone so far as to hold that it must be sufficient to remove all reasonable doubt of the insanity, as in the case of *State v. Spencer*, 21 N. J. L. 196; but we are unable to assent to either view, for reasons which we shall proceed to state.

The rule in criminal cases requiring the prosecutor to establish the guilt of the accused beyond a reasonable doubt has its origin in the humane maxim, that it is better that many guilty persons escape than that one innocent person should suffer. This maxim, obviously, is not founded upon any technical rule or system of pleading, but is based upon broad principles of justice, which forbid the infliction of punishment

until the commission of the crime is to a reasonable certainty established. It has received the sanction of the most enlightened jurists in all civilized communities, and in all ages; and with the increasing regard for human life and individual security, it is quite apparent that the energy of the rule is in no degree impaired. When the evidence is all before the jury, they are to weigh it, without regard to the side from which it comes, and determine whether or not the guilt of the prisoner has been established beyond a reasonable doubt. To hold that the quantity and weight of the evidence is in any degree affected by the fact that the prosecutor has been able to make a case without introducing any matter in excuse or justification, is clearly contrary to the spirit of the rule, and is giving to mere form an effect which, in many cases, must be contemplated with great pain; inasmuch as juries might feel bound to find the prisoner guilty of a capital crime, when, in their consciences, they had serious doubts of the existence of malice or of mental capacity sufficient to charge the prisoner. Such a doctrine must inevitably lead to a constant struggle, on the part of the prosecutor, to prove his case without introducing any evidence of those facts or circumstances upon which the respondent is understood to rely. In a large number of cases, with skillful management, he might succeed, and thus deprive the accused of that protection which the rule, independent of all technicality or matters of form, was designed to afford.

The conflict which exists has probably arisen, in a great degree, from an attempt to apply to criminal causes the rules which govern the trial of issues in civil causes. In the latter, where the defendant sets up matter in excuse or avoidance, he must establish the defense by a preponderance of proof; and by analogy it has sometimes been held, in criminal cases, that matters of defense arising from accident, necessity, or infirmity must be established by a like preponderance of proof. In some cases, it has been carried so far as to require the same quantity of evidence to prove such matters of defense as to prove the commission of the crime, namely, enough to remove all reasonable doubt. But we think there are marked distinctions between the two classes of trials, and that the rules as to the weight of evidence and burden of proof in civil cases are not safe guides in criminal causes. In civil causes, the burden of proof is, in general, upon the party who maintains the affirmative; and when thrown upon the defendant, it is

because he sets up, by his plea, matters which avoid the effect of the plaintiff's allegations, but do not deny them. It is, therefore, right that the burden of proof should be upon him to establish the truth of such matters in avoidance by a preponderance of evidence, especially as nothing more is required than to render the truth of such matters more probable than otherwise. In criminal causes, the trial is usually had upon a plea that puts in issue all the allegations in the indictment; and upon every sound principle of pleading and evidence, the burden is upon the prosecutor to sustain them by satisfactory proofs. A system of rules, therefore, by which the burden is shifted upon the accused of showing any of the substantial allegations in the indictment to be untrue, or in other words, to prove a negative, is purely artificial and formal, and utterly at war with the humane principle which, in *favorem vitæ*, requires the guilt of the prisoner to be established beyond reasonable doubt. Not only so, but fairly considered, such a system derives no countenance from the rules which govern the trials of civil causes, inasmuch as in respect to all the allegations in the declaration, provided they are put in issue, the burden of proof, in general, rests with the plaintiff.

The indictment in this case is for an assault with intent to commit murder; and by the well-settled definition of the offense, murder is when a person of sound memory and discretion unlawfully kills any reasonable creature in being under the peace of the state, with malice aforesaid, either express or implied. To justify a conviction, all the elements of the crime as here defined must be shown to exist, and to a moral certainty, including the facts of a sound memory, an unlawful killing, and malice. As to the first, the natural presumption of sanity is *prima facie* proof of a sound memory, and that must stand unless there is other evidence tending to prove the contrary; and then, whether it come from the one side or the other, in weighing it, the defendant is entitled to the benefit of all reasonable doubt, just the same as upon the point of an unlawful killing or malice. Indeed, the want of sound memory repels the proof of malice, in the same way as proof that the killing was accidental, in self-defense, or in heat of blood; and there can be no solid distinction founded upon the fact that the law presumes the existence of a sound memory. So the law infers malice from the killing when that is shown, and nothing else; but in both cases the inference is one of fact, and it is for the jury to say whether, on all the

evidence before them, the malice or the sanity is proved or not. Indeed, we regard these inferences of fact as not designed to interfere in any way with the obligation of the prosecutor to remove all reasonable doubt of guilt; but are applied as the suggestions of experience, and with a view to the convenience and expedition of trials, leaving the evidence, when adduced, to be weighed without regard to the fact whether it come from the one side or the other.

Our opinion, then, is, that the inference which the law makes of sanity, malice, and the like, is to be regarded as merely a matter of evidence, and standing upon the same ground as the testimony of a witness: 1 Greenl. Ev., secs. 33, 34; and in this respect is like the presumption of innocence: See *Sutton v. Sadler*, 3 Com. B., N. S., 87; S. C., 91 Eng. Com. L. 87. Nor does it shift the burden of proof in the sense of changing the rule as to the quantity of evidence; but is merely *prima facie* proof of the sanity, or malice, upon which, other things being shown, the jury may find a verdict of guilty. If further evidence is offered upon the point, by either party, tending to repel the presumption, the whole must be weighed by the jury, who are to determine whether the guilt of the prisoner is established beyond a reasonable doubt. The criminal intent must be proved as much as the overt act, and without a sound mind such intent could not exist; and the burden of proof must always remain with the prosecutor to prove both the act and criminal intent.

In the English courts, the direct question does not appear to have been discussed, though it is laid down by elementary writers that when the defense is insanity, the burden of proving it is upon the prisoner: Roscoe's Evidence, 5th Am. ed., 944; 1 Russell on Crimes, 10, citing *Bellingham's Case*, reported in 1 Collinson on Idiots, 636, and Roscoe's Evidence, 946, and note to *Rex v. Offord*, 5 Car. & P. 168, where the judge told the jury that to support such defense, it ought to be proved, beyond reasonable doubt, that the respondent was insane. In Foster's Crown Law, 255, it is said: "In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appeareth; and very right it is that the law should so presume. The defendant, in this instance, standeth just upon the same

ground that every other defendant doth; the matters tending to justify, excuse, or alleviate must appear in evidence before he can avail himself of them." So it is laid down in 1 East's Crown Land, 224-340, and Hawk. P. C., c. 31, sec. 32; 4 Bla. Com. 201. On this point, *Oneby's Case*, reported 2 Stra. 766, and also in Ld. Raym. 1485, and decided in 1727, is relied upon as a leading case; but it will be observed that the question of the quantity of evidence was not at all considered, and its weight as an authority is greatly diminished by the fact that it was then held that whether there was malice or not was a question of law; and so, also, whether the act was deliberate or in the heat of passion. In the opinion of the judges, in answer to questions propounded by the house of lords, reported in note to *Regina v. Higginson*, 1 Car. & K. 130, Tindal, C. J., says: "Every man is presumed to be sane, and responsible for his crimes, until the contrary is shown to the satisfaction of the jury; and that to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know it was wrong."

Another class of cases in the English courts are referred to in Wharton's Criminal Law, 264, 265, as cases where the facts of the prosecution are conceded, but the defendant sets up some matter in excuse or avoidance; in which event, it is said that the presumption of innocence no longer works for the defense, and such matter of excuse or avoidance should be proved by the defendant by a preponderance of testimony. The cases cited in support of this doctrine are prosecutions for selling liquor without license, shooting game without the necessary qualifications, practicing medicine without a certificate, and the like. Some of these cases were civil suits, brought for the penalty, and the substance of the doctrine held in them all was, that the affirmative of the facts being with the defendant, and matter being peculiarly within his knowledge, the burden of proof was upon him. But the question before the court, in this case, was not considered, and it was nowhere announced that in case evidence was adduced by the defendant, tending to prove such fact, the jury must require that it should be made to preponderate in his favor.

It will be perceived, then, that according to the general statement of the English doctrine, which is fairly expressed in

the extract from Foster's Crown Law which we have quoted, the obligation of proving any circumstances of accident, necessity, or infirmity, which may be set up as a defense to a charge of murder or other crime, is thrown upon the prisoner; unless such proof arises out of the evidence offered by the prosecution. It is said, indeed, that such circumstances must be satisfactorily proved; but it is not stated by what quantity of evidence, whether such as to preponderate in favor of the prisoner, or whether he is to be entitled to the benefit of reasonable doubts, as in other cases. When we consider, however, that the passage clearly applies to everything which rebuts malice, whether by showing that the act was justifiable, was done in necessary self-defense, or that the prisoner was not capable of committing the crime by reason of insanity, it may well be urged that nothing more was intended than this. If the prosecutor has proved the commission of the offense without disclosing any circumstance of justification, necessity, or infirmity, or other matter of defense relied upon by the accused, then the burden will be upon the latter to offer so much proof of the matters constituting his defense as will, upon the rules of law, entitle him to a verdict of not guilty. Not that his proof shall be sufficient to establish such facts by a preponderance of evidence, but sufficient to entitle him to an acquittal. If it were not so, what shall be the rule when some evidence of the matter in excuse or justification unavoidably creeps in with the government proof, and still the accused offers more to the same facts? To hold that the rule upon which the life or death of a human being may depend is to be affected by a circumstance so trivial before any enlightened conscience, would be giving to mere form a weight wholly inconsistent with the humane spirit of our criminal laws. In the opinion of Tindal, C. J., before cited, which was given without argument, and without the attention of the court being distinctly drawn to this point, it is by no means clear that any different rule as to the quantity of evidence was intended to be announced, although there may be some expressions tending that way.

In *Commonwealth v. York*, 9 Met. 93 [43 Am. Dec. 373], it was decided that malice was to be inferred from a willful and voluntary killing, unless it was proved by a preponderance of evidence by the accused that the act was done in an affray in the heat of blood. The opinion was pronounced by Shaw, C. J., after a most able and thorough examination of the authorities, and it is apparent that he gave great weight to the

statement of Sir Michael Foster, which we have cited. The court, however, were not unanimous, Wilde, J., having delivered an able dissenting opinion. In the previous case of *Commonwealth v. Rogers*, 7 Id. 504 [41 Am. Dec. 458], it was held that the ordinary presumption of sanity must stand until rebutted either by evidence offered by government or by the prisoner; and in either case the evidence must be sufficient to establish the fact of insanity. Subsequently, in *Commonwealth v. Hawkins*, 3 Gray, 463, the doctrine of *Commonwealth v. York*, 9 Met. 93 [43 Am. Dec. 373], was restricted by Shaw, C. J., to cases where the killing was proved, and nothing else; but it was held that where the circumstances were fully shown, the burden was upon the state to show the malice beyond a reasonable doubt. The cases of *Commonwealth v. Rogers*, 7 Met. 500 [41 Am. Dec. 458], and *Commonwealth v. York*, 9 Id. 93 [43 Am. Dec. 373], put upon the same ground the rebutting of malice, by showing that the act was done during an affray in the heat of passion, and that by reason of insanity the accused was incapable of malice. And it is quite obvious, we think, that in principle there is no difference; in both cases the same element of the crime is proved not to exist, and the indictment, therefore, is not sustained; and to that effect is the doctrine of the passage before cited from Foster's Crown Law.

The general doctrine of *Commonwealth v. York*, 9 Met. 93 [43 Am. Dec. 373], has been followed in several of the American courts, giving it as authority: *People v. Milgate*, 5 Cal. 127; *Graham v. Commonwealth*, 16 B. Mon. 587; *State v. Stark*, 1 Strobb. 479; *State v. Spencer*, 21 N. J. L. 196. The doctrine of *Commonwealth v. York*, 9 Met. 93 [43 Am. Dec. 373], has since been greatly shaken, if not overthrown, in *Commonwealth v. McKie*, 1 Gray, 61 [61 Am. Dec. 410], in an able opinion of Bigelow, J., which decided that where evidence of the facts constituting a justification, came from both sides, the burden of proof remained on the government throughout, to remove all reasonable doubt of guilt; and the reasons assigned apply with equal force when such evidence all comes from the prisoner. It is true that the learned judge says: "There may be cases where a defendant relies upon some distinct, substantial ground of defense, not necessarily connected with the transaction on which the indictment is founded, in which the burden of proof is shifted upon the defendant;" and he instances the case of insanity, but expresses no opinion upon it.

It was, however, held in a subsequent case (*Commonwealth v. Eddy*, 7 Id. 583) that the burden of proof resting on the government is sustained so far as the defendant's mental capacity is concerned, by the presumption of sanity, until rebutted and overcome by a preponderance of the whole evidence; thus giving to the presumption of sanity an effect that is not given by the doctrine of *Commonwealth v. McKie*, 1 Id. 61 [61 Am. Dec. 410], to the presumption of malice; which, nevertheless, as we think, stands upon the same ground. According to these decisions, then, the rule in Massachusetts, as to the quantity of evidence to establish a defense, arising from accident or necessity, now corresponds with the views we entertain, and with our construction of the passage cited from Foster's Crown Law; and the principle of the rule includes also the defense arising from insanity or infirmity.

In accordance with our views is the doctrine of *People v. McCann*, 16 N. Y. 58 [69 Am. Dec. 642], where the subject is most ably discussed; *Ogletree v. State*, 28 Ala. 693; *United States v. McClare*, 7 Law Rep., N. S., 439, U. S. Dist. Ct., by Sprague, J.; 1 Am. Lead. Crim. Cas. 347, and note, and cases cited.

Such, also, we think, has been the course of trials in this state. It was clearly so on the trial of Corey, in Cheshire county, for murder, in 1830, October term, before the superior court of judicature, Richardson, C. J., presiding, where the defense set up was insanity. The court charged the jury that the state had no claim to their verdict until they were satisfied, beyond all reasonable doubt, that the prisoner was guilty; and in that case, the only question was, whether he was insane, the guilt otherwise being clear.

So was *State v. Prescott*, tried in Merrimack county, September, 1834 [not reported], before Richardson, C. J. In that case, which was for the murder of Mrs. Cochran, the fact of killing was also clear, and the only defense was insanity. The judge charged the jury that it was their duty not to pronounce the respondent guilty until every reasonable doubt of his guilt was removed from their minds. And again, he said: "We are of the opinion that if, under all of the circumstances of the case, you have any reasonable ground to suppose that the prisoner could not have had the use of his reason, you are bound to acquit him."

With these views of the law, and the course of our own courts, there must be a new trial.

JURY'S DUTY, WHERE INSANITY IS SET UP AS DEFENSE TO CRIME: See extended note to *State v. Marler*, 36 Am. Dec. 402-411, on insanity as a defense to crime; *Freeman v. People*, 47 Id. 216; *Carter v. State*, 62 Id. 539; *People v. McCann*, 69 Id. 642. In the case last cited, it is said that a preponderance of proof is sufficient to establish insanity, and that an instruction that it must be proved beyond a reasonable doubt is erroneous.

THE PRINCIPAL CASE IS CITED in *Hill v. People*, 1 Col. 453, to the point that in a criminal case, where the defense is based upon the facts and circumstances growing out of the charge itself, the burden of proof remains on the government throughout, to satisfy the jury of the guilt of the defendant.

DREW v. KIMBALL.

[43 NEW HAMPSHIRE, 282.]

EQUITABLE ESTOPPEL, WHAT CONSTITUTES.—When one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.

REPRESENTATIONS ARE TO BE REGARDED AS "WILLFUL" when the person making them means them to be acted upon, or if, without regard to intention, he so conducts himself that a reasonable man would take the representation to be true, and believe it was meant that he should act upon it.

TO CONSTITUTE ESTOPPEL, IT IS NOT NECESSARY TO SHOW THAT PERSON MAKING REPRESENTATION DESIGNED TO INDUCE PARTICULAR PERSON who sets it up as an estoppel to act upon it as true. It is enough that he should hold out to all who have occasion to act the existence of a certain state of facts which they might assume to be true, and act upon accordingly.

TO CONSTITUTE ESTOPPEL, IT IS OF NO IMPORTANCE WHETHER DECLARATIONS OR ADMISSIONS BE MADE IN EXPRESS LANGUAGE to person himself who sets them up as an estoppel, or are implied from the open and general conduct of the party; as the implied declaration may be considered as addressed to every one in particular who may have occasion to act upon it.

"CREDITOR'S POSITION IS CHANGED" BY ATTACHMENT, WITHIN MEANING OF LAW OF ESTOPPEL. Where A is clothed by B with all indications of ownership to property, and A's creditor acts upon that fact and attaches the property as A's, it will be such a change of his position as to estop B from denying the truth of his representations that it was A's property.

ESTOPPEL.—Where A put cattle into B's possession to sell, with an agreement that they should be held out as B's cattle, the better to effect a sale, and B represented to one of his own creditors that he had bought the cattle of A, and the creditor, acting upon this representation, attached the cattle as B's, A was held to be estopped to set up property in himself against such creditor, although B, at the time of the attachment, informed the officer that the cattle belonged to A.

TROVER, for converting certain cattle of the plaintiff, attached by the defendant, as a deputy sheriff, as the property

of one French, on a writ in favor of one Page. Plaintiffs' testimony tended to show that the property belonged in fact to him, and that he had put it into the hands of French to sell. Defendant's evidence tended to prove a sale by the plaintiff to French; and he offered evidence of the plaintiff's statement that he had sold the cattle to French. Plaintiff was then permitted to testify, against the defendant's objection, that French had advised him that it would be necessary, in order to obtain a fair price for the animals, to conceal the fact that he still owned them; and that, in accordance with this advice, he had, in conversation with the defendant's witness, disavowed ownership in the cattle. French was also permitted, against defendant's exception, to state that he had so advised the plaintiff, and assigned as the reason for it that the plaintiff was living at a distance, and the winter approaching, of which purchasers would take advantage. Defendant then introduced Page, who testified that on the day the plaintiff left, but after he was gone, French told him that he had bought the stock, and that it was his property. Page thereupon, on the same day, caused the stock to be attached, on a demand of some years' standing. French was present at the time of the attachment, and notified the officer that the plaintiff owned the stock. The court was requested by the defendant to charge the jury that if the plaintiff and French agreed together to represent that the property had been sold to French, and he, under that agreement, so represented to Page, who was induced thereby to cause the property to be attached, then the plaintiff was estopped to claim the property in this action. The court declined to so charge the jury. Verdict for plaintiff, and defendant excepted.

C. H. Bell, for the defendant.

Tuck and French, for the plaintiff.

By Court, BELLOWS, J. The principal question is, whether the plaintiff is estopped by his acts, and the representations to Page, to deny that the cattle belonged to French. On this point the case finds that at the time the cattle were attached by the defendant upon the writ in favor of Page against French, they were in French's possession. And the plaintiff's case is that they were his property, and merely left with French to sell. And he testified that for the purpose of concealing the fact that he owned the cattle that a sale of them might be better effected, he had disavowed such ownership;

and that this was done in pursuance of the advice of French. And Page testified that on the day of the attachment, after the plaintiff had left for his home, the said French told him that he had bought the cattle, and they were his property; and he thereupon caused them to be attached.

Under these circumstances, the defendant requested the court to charge the jury that if the plaintiff and French agreed to represent the property to have been sold to French, and the latter, under that arrangement, had so represented it to Page, who was thereby induced to cause the property to be attached, the plaintiff was estopped to claim the property in this action.

Upon the evidence reported, we think the jury might have found the facts stated in this request; and therefore the question is, whether there was error in declining to give such instructions. If such representation was made by French by the direction or authority of the plaintiff, the effect would be the same, necessarily, as if made by the plaintiff himself; and so we propose to consider it.

What constitutes an equitable estoppel is well stated by Lord Denman in *Pickard v. Sears*, 6 Ad. & El. 469, in these words: "When one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." This definition is adopted in our own state, in *Davis v. Handy*, 37 N. H. 75; and *Odlin v. Gove*, 41 Id. 465 [77 Am. Dec. 773]; and in *Copeland v. Copeland*, 28 Me. 525; and *Brown v. Wheeler*, 17 Conn. 345; and in *Freeman v. Cooke*, 2 Exch. 654, Mr. Baron Parke, who delivered the opinion of the court, holds that this definition must be considered as established in the English courts. At the same time he says: "By the term 'willfully,' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly. And if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth." In short, the representations are to be regarded as "willful," when the person making them means

them to be acted upon, or if without regard to intention, he so conducts himself that a reasonable man would take the representation to be true, and believe it was meant he should act upon it. That was an action of trover by the assignees of William Broadbent against the sheriff for goods seized on execution against Joseph and Benjamin Broadbent. It appeared that when the sheriff's officer entered to take the goods, the bankrupt, supposing the writ to be against himself, informed the officer that the goods belonged to Benjamin. Afterward, on the writ being shown, he said the goods belonged to another brother, and finally to himself. The sheriff then seized the property and sold it as the property of Benjamin; but the jury found that the goods were in fact William's. The court held that the defendant was not entitled to have a verdict entered for him, because it was not found that the bankrupt intended to have the goods seized as Benjamin's; nor could it be said that any reasonable man would have seized the goods on the faith of the bankrupt's representations taken altogether. And the court also says that whatever intention he had in his first statement was done away with by an opposite statement before the goods were seized. As to the principle laid down in *Pickard v. Sears*, 6 Ad. & El. 469, see *Gregg v. Wells*, 10 Id. 90; and also 2 Smith's Lead. Cas. 460, and cases cited.

In the case before us, we are referred to *Pierce v. Andrews*, 6 Cush. 4 [52 Am. Dec. 748], where the agent of a creditor of B called upon the plaintiff to inquire who owned a certain horse in the plaintiff's possession; and the latter, without knowing the purpose of the inquiry, said it belonged to B; and thereupon a sheriff seized the horse, on the creditor's execution against B, and sold it. The court decided that the plaintiff was not estopped to prove that the horse was his own, saying no one can be estopped by a deceptive answer to a question which he may rightfully deem impertinent, and propounded by a meddling intruder, especially if he give notice of the truth as soon as he perceives that his answer is acted upon as if it were true. There was evidence in this case tending to show that, by an arrangement between the plaintiff and B, the latter was authorized to call the horse his own, if he could thereby better effect a sale, and that he did so, and the plaintiff also spoke of the horse as B's. The court instructed the jury that if B called the horse his own, and exercised acts of ownership over him, and the plain-

tiff also called him B's, then, if the defendant seized him without notice that the plaintiff was the owner, the plaintiff would be estopped; but not if the plaintiff, at the time of the seizure, gave notice that he was the owner, and forbade the sale. And these instructions were approved by the court above.

By the definition by Baron Parke, in *Freeman v. Cooke*, 2 Exch. 654, of the term "willful," in the rule laid down in *Pickard v. Sears*, 6 Ad. & El. 469, it is not to be understood that to create an estoppel, the party making the representation by words or conduct meant to induce the particular person who sets up the estoppel to act upon it, or that such person should have reason to think that it was intended that he in particular should act upon it. But it is sufficient if such representation was intended to induce, or calculated to induce, all persons who might have occasion to act upon it, to believe it to be true, and act accordingly; as in the case put by Baron Parke, of a retiring partner omitting to inform his customers of the fact in the usual manner, that the continuing partners were no longer authorized to act as his agents. Here, although the omission to give notice was merely the result of negligence, and with no purpose to induce any one to act upon the belief that he was still a partner, yet, as between him and the person who was in this way induced to give credit to the firm, he is bound. This would be a case of negligent or culpable omission within the rule of Lord Denman, in *Gregg v. Wells*, 10 Id. 90. So where a man cohabits with a woman, holding her out to the world as his wife, and a tradesman, trusting to this state of things, supplies her with goods upon the reputed husband's credit, in a suit for the price, the latter will not be permitted to disprove or deny the marriage, because every one has a right to act upon the faith that such a representation is true, whether the reputed husband meant he should do so or not: 1 Greenl. Ev., sec. 207. The same doctrine is laid down in 2 Stark. Ev., 33, and in 2 Cowen & Hill's notes to Phill. Ev., note 192, and cases cited; *Divoll v. Leadbetter*, 4 Pick. 220; see also *Northwood v. Durham*, 2 N. H. 242.

Nor does the case of *Pierce v. Andrews*, 6 Cush. 4 [52 Am. Dec. 748], conflict with this view; for there the reason assigned was, that the plaintiff had no ground to suppose that the creditor had any interest in knowing who owned the horse, and might rightfully deem the question put to him as impertinent. There are, however, several American cases which, apparently, assume the rule to be, that to constitute an equitable

estoppel, the representation or admission should be intended or designed to influence the conduct of the man with whom the party is dealing. Such may have been the view of Cowen, J., in *Dezell v. Odell*, 3 Hill (N. Y.), 215 [38 Am. Dec. 628]; and in *Welland Canal Co. v. Hathaway*, 8 Wend. 483 [24 Am. Dec. 51], the estoppel was said to exist when the acts or admissions were expressly designed to influence the conduct of another, and did so influence it. In *Brown v. Wheeler*, 17 Conn. 844 [44 Am. Dec. 550], the rule in *Pickard v. Sears*, 6 Ad. & El. 469, as before cited, is recognized as the true one, although in the head-note the word "designedly" is used instead of "willfully:" See also 2 Smith's Lead. Cas., 5th Am. ed., 643, and cases cited. In *Copeland v. Copeland*, 28 Me. 528, declarations made without any design or reason to suppose they would influence another were held not to be an estoppel.

In none of these cases was the attention of the court drawn to the distinct point whether it was necessary to show that the person making the representation designed to induce the particular person who sets it up as an estoppel to act upon it as true, or whether it is not enough that he should hold out to all who have occasion to act the existence of a certain state of facts which they might assume to be true, and act upon accordingly. In the case of *Howard v. Hudson*, 2 El. & Bl. 1, it was held that there being no evidence that the defendant intended the plaintiff to act upon the faith of the representations, or that he did so act, the defendant was not estopped. And the court use language which implies a necessity to prove a willful intent to make the plaintiff act on the faith of such representations, in order to constitute an estoppel. At the same time, the court fully recognize the definition by Baron Parke, in *Freeman v. Cooke*, 2 Exch. 654, of the term "willful," in the rule announced in *Pickard v. Sears*, 6 Ad. & El. 469.

In other American cases, the rule is announced in terms which imply no intent to influence the acts of the particular person; as in *Hicks v. Cram*, 17 Vt. 449-455, where it is said: "If one man has made a representation which he expects another may or will act upon, and the other does, in fact, act upon it, he is estopped. So in *Wooley v. Chamberlain*, 24 Id. 270-276, it is said by Redfield, C. J.: "That the party should be made fully aware of the intent of the person making the inquiry, or that the declaration is going to be or will be likely to be relied upon by some one." In *Rangley v. Spring*, 21

Me. 130, the rule is announced to be: "Where a party has so conducted himself as wittingly or willingly to lead another into the belief of a fact whereby he would be injured, if the fact were not as so apprehended, the person inducing the belief will be estopped from denying it, to the injury of such person." So in 1 Greenl. Ev., sec. 207, it is said: "That it is of no importance whether they [the admissions] were made in express language to the person himself, or implied from the open and general conduct of the party. For in the latter case, the implied declaration may be considered as addressed to every one in particular who may have occasion to act upon it." And we are disposed to regard this as a correct statement of the principle to be extracted from the adjudged cases, and as applicable to the general question before us.

In this case, the cattle were put into the possession of French by the plaintiff, to be held out and treated as the property of French; not to any particular person especially, but generally, to the public and all concerned. And it appears, from the testimony of the plaintiff and others, that they were so held out both by the plaintiff and French. Or in other words, the plaintiff put the cattle into French's possession, with the distinct understanding that he should assume to be the owner, and so hold out to the world. This he did do; and the fact coming to the knowledge of French's creditor, he acted upon it as if it were true, and attached the property.

It is an imperfect view of the case to regard the representation of French to the creditor as the chief element of the estoppel attempted to be set up. That is but evidence that the creditor had knowledge of the arrangement and acted upon it. Had the knowledge come from any other source, the effect would have been the same; because the foundation of the estoppel is the clothing of French with all the indications of ownership, and the acting upon that fact by the creditor. If, then, the creditor changed his position in consequence of such holding out, so that he would be injured by showing the contrary, the plaintiff must, in accordance with the principles laid down, be estopped to deny the truth of the representations.

Upon a careful consideration of the cases, we think an attachment by the creditor would be such a change of position. By it he incurs expenses, and subjects himself to a suit by the owner, and he would be injured by disproving the facts upon the faith of which he made the attachment.

In *Presbyterian Society v. Williams*, 9 Wend. 147, a tenant told his landlord that there was no property on the premises, and thereupon the landlord brought ejectment; and it was held that the tenant was estopped to prove that there was sufficient property. So where a debtor declares that he has no property, and the officer thereupon takes the body, the debtor cannot complain that credit was given to his statement: *Hollister v. Johnson*, 4 Id. 639. So where the defendant, in an action of trover, had told the plaintiff that he had the property in his possession, and thereby induced him to sue for it, it was held that the defendant was estopped to deny it: *Hall v. White*, 3 Car. & P. 136. So where the defendant, to induce a suit to be brought against him, said he was in possession, and was sued accordingly, it was decided that he was estopped to prove the contrary: *Mordecai v. Oliver*, 3 Hawks, 479. In *Tufts v. Hayes*, 5 N. H. 452, where the defendant attempted to set up an estoppel by showing that the plaintiff had said to third persons that he owned two cows, the court held that such loose declarations to third persons were not enough; but that the declarations must have been under such circumstances as to have given to the defendant, or the one who employed him, a right to consider both as the plaintiff's property; so as to render a denial of the truth of the declarations now inconsistent with good faith and honest conduct. In this case, the plaintiff sued for his only cow, which the defendant had attached. Where a person gave his name as John to the plaintiff, who sued him by that name, held that he could not insist that it was William: 2 Stark. Ev. 33; *Price v. Harwood*, 3 Camp. 108. So the case of *Freeman v. Cooke*, 2 Exch. 654, goes upon the ground that the seizure of goods on execution would be a sufficient change of position, if induced by the party's representations.

We are, then, brought to the conclusion that, in this case, the jury might have found that the acts and declarations of the plaintiff and his agent caused the creditor of French to change his position within the meaning of the rule, unless controlled by the notice given by French at the attachment that the plaintiff owned the stock. It is quite clear that if notice, such as a reasonable man ought to rely upon, had been given to the creditor before any expense had been incurred by him, he could not be said to have acted upon the faith of the prior acts and declarations.

But it is impossible to hold, as matter of law, that he did

act act upon the faith of the former acts and declarations, notwithstanding the notice.

It may be said that the party was at least put upon inquiry; but it will be remembered that the writ had been obtained, and the officer directed to attach the property, and was on the ground for that purpose; and it does not appear that the creditor under whose orders he was acting was present or at hand. Ought the officer, then, to have suspended proceedings for the purpose of inquiry, and thus taken the risk of intervening claims? And upon the whole, we are inclined to think that, under the circumstances, the notice avails nothing. In *Stowe v. Meserve*, 13 N. H. 46, it was decided that notice by the debtor to an officer, who was about to levy an execution upon personal property, of an unregistered mortgage upon it did not put the officer upon inquiry, and the reasons assigned apply forcibly to this case. Here, upon the circumstances existing prior to the notice, and upon the faith of which the creditor had a right to rely, the property was liable to attachment—the plaintiff had voluntarily so placed it, and for purposes of deception; the creditor had, on the faith of it, been at the expense of procuring a writ, or at least the jury might have so found, and sending the sheriff to attach it; and we think the notice was too late to avail the plaintiff.

Whether any notice, at the time of the attachment, would have affected the creditor need not now be determined; because we think it would be unreasonable to give effect, under the circumstances, to the statements of a debtor of a character so often made to protect a debtor's property from attachment, and which could not always, or perhaps generally, be safely regarded by the officer. So, in *Ranlett v. Blodgett*, Grafton county [not reported].

The only remaining question likely to arise upon another trial relates to the competency of the explanation of the plaintiff of his statement that French owned the cattle, and we think it was rightly received: *Queen's Case*, 2 Brod. & Bing. 294; *Odlin v. Gove*, 41 N. H. 465 [77 Am. Dec. 773].

Verdict set aside.

ESTOPPEL BY MATTER IN PARS is sometimes denominated estoppel in fact and equitable estoppel. And it is so named in distinction from the other classes of estoppel, because the preclusion arises from matter of fact, evidenced neither by record of adjudication nor by deed: *Bigelow on Estoppel*, § 14.

ESTOPPEL IN PAIS, WHAT CONSTITUTES: See note to *Wells v. Higgins*, 13 Am. Dec. 237; *Welland Canal Co. v. Hathaway*, 24 Id. 51, and numerous cases cited in note thereto 58; note to *Desell v. Odell*, 38 Id. 631, 632; *Commonwealth v. Moltz*, 51 Id. 499, and collected cases in note to same 505; *Taylor v. Zepp*, 55 Id. 113; *Jewett v. Miller*, 61 Id. 751, and note 756; *Titus v. Morse*, 63 Id. 665; *Bryan v. Ramirez*, 68 Id. 340, and note 345; *Beaupland v. McKeen*, 70 Id. 115, and note 122; *West Winsted Savings Bank v. Ford*, 71 Id. 66. Where one, by his words or actions, intentionally causes another to believe in the existence of a certain state of things, and thereby induces him to act on that belief, so as injuriously to affect his previous position, he is precluded from averring a different state of things as existing at the time: See notes to *Cowles v. Bacon*, 56 Id. 378; *Taylor v. Zepp*, 55 Id. 118. The principal case was also cited to this point in *Libbey v. Pierce*, 47 N. H. 314; and upon this principle, if one stands by and sees his property sold to another, and is silent in respect to a claim which he knows he can set up, whereby the purchaser is misled, he will not be permitted afterwards to make such claim: See case last cited.

FACTS WORKING ESTOPPEL.—Where H., a clerk, sold liquor in M.'s store, and M. declared it belonged to H., held that when attached for the debts of H., M.'s declaration estopped him from claiming the property: *Mitchell v. Reed*, 70 Am. Dec. 647.

PAGE v. PARKER.

[43 NEW HAMPSHIRE, 363.]

MOTION FOR NONSUIT WILL NOT BE GRANTED if there is any competent evidence tending to prove the fact in issue.

CONSPIRACY TO DEFRAUD BEING PROVED, whatever is shown to be done or said by any one of the conspirators in furtherance of the common design is the act or saying of all.

FRAUDULENT REPRESENTATION IN SALE OF ARTICLE CONSISTS in some recommendation of it, or statement in regard to its good qualities, which is known to be untrue.

FRAUDULENT CONCEALMENT IS INTENTIONALLY OMITTING TO DISCLOSE SOME BAD QUALITY, or some fact relating to the property, known to the vendor and unknown to the purchaser, which it is material that the latter should know to prevent being defrauded.

IN ACTION FOR FRAUDULENT REPRESENTATION, it is essential that plaintiff credited the representation, acted upon it, and was in consequence damaged.

ACTION FOR FALSE REPRESENTATION WILL NOT LIE for vendor's misrepresenting the value of the thing sold, nor where the purchaser might, by the exercise of common prudence, have ascertained the truth, and saved himself from injury.

FALSE REPRESENTATIONS, TO BE GROUND FOR ACTION, MUST BE MATERIAL, and fraudulently, knowingly, and intentionally made; and must be accompanied by some deceit practiced for the purpose of putting the vendee off his guard.

MEASURE OF DAMAGES FOR FALSE REPRESENTATION is the difference between the value of the property as it actually was, and its value as it would

have been if it were such as it was represented to be in those particulars, in relation to which the false and fraudulent representations were made. **PRICE PAID FOR PROPERTY PURCHASED UNDER FALSE REPRESENTATIONS** is strong but not conclusive evidence of the value of the property as it was represented to be.

RULE OF DAMAGES IN CASES OF WARRANTY DIFFERS FROM RULE IN CASES OF DECEIT AND FRAUD in this: that in warranty the vendor is answerable for all defects covered by the warranty, whether he knew of them or not; while in deceit he is only answerable for the particular defects concerning which he knowingly misled the purchaser to his injury. The rule will be the same only when the warranty covers precisely the same ground as do the false, fraudulent, and material representations.

CASE. David M. Parker was the owner of a soap-stone quarry. He executed deeds to Reding and Page for the property. Reding's deed called for one third of the quarry, and he represented to Page that he was a joint purchaser with him. Reding was in fact merely assisting Parker to make a trade. He paid no money for the one third deeded to him. William M. Parker, a brother of David M. Parker, assisted in the deception, and together they represented to Page that the quarry was worth from twenty-five thousand to thirty thousand dollars, and a great bargain at fifteen thousand dollars; but they concealed the fact that they had been offering to sell the premises for ten thousand dollars. Learning these facts, Page brought an action against David M. Parker, William M. Parker, and H. W. Reding for conspiring together to cheat and defraud him, by selling the property to him at a price greatly exceeding its value. After these facts had been proved by plaintiff, defendants moved a nonsuit; but the motion was denied. The instructions given to the jury sufficiently appear in the opinion. The jury found a verdict against defendants, and fixed the damages at ten thousand eight hundred dollars and seventy-two cents. Defendants appealed.

Hibbard, and C. W. and E. D. Rand, and Page, for the plaintiff.

Woods and Bingham, for the Parkers, defendants.

Felton, for Reding, defendant.

By Court, SARGENT, J. The motion for a nonsuit as to David M. Parker, in this case, was properly denied. It had been proved that he was the owner of the quarry, and the brother of William M., and that David himself executed the deeds to Reding and Page, and caused them to be deposited with Mr. Felton, in accordance with the arrangement of Wil-

liam M., who had acted as the ostensible agent of David, and that all the material representations set forth in the declaration were made directly by William M. and Reding to Page, Reding concealing his true position and relations to the transaction from Page. In connection with this evidence, it is only necessary to refer to the testimony of William M. Parker to be satisfied that there was some evidence tending to show that David was connected with and interested in the conspiracy and fraud by which the plaintiff suffered, if any such conspiracy existed, or any such fraud was perpetrated, and if there was any evidence tending to prove that fact in the case, competent to be submitted to the jury, then the motion for a nonsuit as to him could not prevail.

William M. Parker testified that he learned part of his information from his brother, etc.: "I told my brother that Reding was going to take one third and Page two thirds of the purchase. He knew that Reding was to pay nothing except his services, some bills, and personal expenses for going to the quarry. Everything between my brother and Reding was understood, and that he was to be interested on favorable terms. My brother got sick of the quarry in June, 1856. He gave me entire control over the affair, by power of attorney. I knew my brother was ready to verify everything I had been representing, etc. My brother knew substantially what passed between us; he knew the main facts. If it proved a bad operation, I understood my brother would consent to have the notes extinguished. My brother allowed me to write what I was a mind to. The notes were under his control. He allowed me to do pretty much as I had a mind to. I never had any legal right to the money. The money went into a common purse. My brother had about two thousand dollars, and I had the balance."

This, taken in connection with the fact that David M. Parker was a witness upon the stand, and did not deny the conspiracy, and in connection with the other testimony in the case, would seem to leave no doubt about the correctness of this ruling. The jury may have found, from all the evidence, that David M. Parker knew all, and assented to all, and participated in all that was done, and was the originator and instigator of the whole plan, whose execution was intrusted to other hands.

The instructions in regard to what the jury must find, in order to charge all the defendants, are not objected to. They would seem to be full and sufficient. The remarks that were

made by the court, in regard to the general principles on which parties should proceed in making contracts, were not very material to this case, and are not important to be considered.

The instructions that were requested in relation to Reding were properly withheld. It is argued that the misrepresentations that he admits he made to, and the facts which he admits he concealed from, Page were not material in the case, and were not set forth in the plaintiff's declaration, nor relied on by him at all in making out his case. That may all be true, and yet the ruling be correct. If the jury found that Reding, with the other two, had combined and conspired to effect a common object, and it was arranged that each should do certain acts and perform certain parts, with a view to the attainment of the same common result, or that one or two were to be the active agents, while the other one or two remained in the background, and took no open or visible part in the transactions, yet they would all be alike responsible for the acts of all and of either one. Whatever is done or said by either one of the number, in furtherance of the common design, becomes a part of the *res gestæ*, and is the act or saying of all.

In this view, it would make no difference whether Reding did anything himself, provided he was a member of the combination or conspiracy, so as to become responsible for the acts of the others. But it is argued by counsel that if there was no fraudulent concealment on the part of Reding, he could not have been a member of the combination to defraud Page, because, if he was such a member of the conspiracy, and did not communicate it to Page, that of itself was a fraudulent concealment. But that was not the way the instructions were understood, or would ever be understood in that connection.

The terms "fraudulent representations" and "fraudulent concealments," in the sale of an article, refer ordinarily to the communications made between the parties in regard to the qualities of the article, whether good or bad. The fraudulent representation is some recommendation of the article, or statement in regard to its good qualities, which is known to be untrue; and the fraudulent concealment is the intentionally omitting to disclose some bad quality, or some fact in relation to the property known to the vendor and unknown to the purchaser, which it is material that the latter should know, to prevent being defrauded.

This was the kind of concealment referred to in the in-

structions requested. They were so understood, and would be always, we have no doubt; and if any concealed meaning was covered in these instructions, not apparent on their face, no benefit should be received from it. When instructions are desired, they should be plainly and fully stated. If counsel intended, by these instructions which they asked, what they now suggest that they did, it was their plain duty to have put them in a clear and tangible form, and to have requested the court to instruct the jury that if they found that Reding was not a party to any combination or conspiracy to defraud Page, and that he made no representations intentionally false, except, etc., they should have found him not guilty; then they would have been understood. But such instructions would not, of course, be asked for, because they had already been substantially given, or if not they would have been, without hesitation. But no such interpretation can fairly be given to the instructions desired.

The plaintiff's counsel requested the court to instruct the jury that if they found that the defendants conspired and agreed together to cheat and defraud the plaintiff, and made any material representation to the plaintiff that was false and fraudulent, and made for the purpose of carrying out said conspiracy, that the jury would be justified in finding the defendants guilty.

We understand, from the case, that these instructions were not given; and in the terms in which they were requested they were properly withheld, and could not properly have been given. They leave out altogether one of the main elements upon which the jury could find for the plaintiff at all; that is, that the plaintiff credited said representation, acted upon it, and was, in consequence, damaged. Without these qualifications, they should have been withheld, as we understand they were; but with these qualifications added, they would have been proper, and would undoubtedly have been given.

The rule of damages, as given to the jury by the court in this case, taken in connection with the instructions requested by the defendant, have required and received a careful examination.

It is not every false affirmation of the vendor of property that will give the vendee an action, even though he may be deceived by it. If the buyer trusts to representations which were not calculated to impose upon a man of ordinary prudence, or if he neglects the means of information easily within

his reach, it is better that he should suffer the consequences of his own folly than to give him an action against the seller: *Sugden on Vendors*, 2, 3; *Bowring v. Stevens*, 2 Car. & P. 337.

No action will lie for a false representation by the vendor concerning the value of the thing sold, it being deemed the folly of the purchaser to credit the assertion, and beside, value is a matter of judgment and estimation about which men may differ. Nor will an action lie for a false affirmation that a person bid a particular sum for the estate, although the vendee was thereby induced to purchase, and was deceived as to the value. And so of other cases where the purchaser might, by the exercise of common prudence, have ascertained the truth, and saved himself from injury: *Harvey v. Young*, Yelv. 21; *Bayly v. Merrel*, Cro. Jac. 386; *Davis v. Meeker*, 5 Johns. 354; *Fenton v. Browne*, 14 Ves. 145; *Van Epps v. Harrison*, 5 Hill, 63 [40 Am. Dec. 314].

In such cases, the false affirmation, though knowingly and intentionally made, is not enough. The vendee must go further, and show that some deceit was practiced for the purpose of putting him off his guard: *Van Epps v. Harrison*, 5 Hill, 63 [40 Am. Dec. 314]; *Dawes v. King*, 1 Stark. 75. Though a distinction has been made between a general affirmation as to the value of the thing sold, and a false statement that the property was rented for forty-two pounds per annum, when the rent was much less than that, whereby the plaintiff was deceived and induced to pay a high price for the property: *Elkins v. Tresham*, 1 Lev. 102; *Lysney v. Selby*, 2 Ld. Raym. 1118; *Nurse v. Frampton*, 1 Salk. 214; *Dobell v. Stevens*, 8 Barn. & Cress. 623; *Bowring v. Stevens*, 2 Car. & P. 337. And for the reason, as stated by Gould, J., in *Lysney v. Selby*, 2 Ld. Raym. 1118, that "the value of the rents was a hard thing to be known, and secret, known to none but the landlord and the tenants, and they might be in confederacy together." And it was held in *Van Epps v. Harrison*, 5 Hill, 63 [40 Am. Dec. 314], that a fraudulent representation that a piece of property cost the vendor thirty-two thousand dollars, when in fact it cost him but sixteen thousand dollars, furnished a good ground of action—Bronson, J., dissenting, and holding that the statement of what the property cost was but another mode of asserting that the property was of that value, which latter representation is not actionable, though false. But we think the holding of the court was right in that case.

Again, not every false representation, though material, and

though acted on by the purchaser to his damage, is actionable in this form of action. Where there is a warranty, and the purchaser acts upon it, and the article proves to be defective in some quality covered by the warranty, the purchaser has his action. And it makes no difference whether the vendor knew of the defect, or did not know of it; he must make his warranty good. But in an action for deceit in the sale of property, it is not only necessary that the misrepresentation be false, but it must also be fraudulent, in order to be actionable. There may be many misrepresentations made, all of which are false in fact, a part of which are fraudulent, and a part ignorantly but honestly made. In this form of action, no damages can be recovered for the latter class of misrepresentations, however much the purchaser may have been influenced and damaged by them. The fraud being the gist of this action, it is only those misrepresentations that were material and fraudulently made that can be actionable here.

No fault is found with the instructions given in regard to these matters. The court instructed the jury not only that they must find that the conspiracy was entered into, etc., but "that a positive fraud had been thus committed by the defendants upon the plaintiff, and a damage resulting to him therefrom; that the plaintiff must show, not only that the representations made to him were false, and known to them at the time to be so, but that they were intended to deceive him, and that he believed and acted upon them as true; that when both parties knew, or with ordinary care might discover, the facts, and there be no misrepresentation or warranty, the buyer is his own insurer, and the law will give him no remedy." These instructions seem to be correct so far as they go, and are sufficient, on the point of materiality of the misrepresentation, and the necessity of its being fraudulent as well as false, in order to be actionable here: *Page v. Parker*, 40 N. H. 69.

Upon the former trial of this case, at the trial term, the court instructed the jury that the measure of damages, if they found for the plaintiff, "was the difference in the value of the property as it actually was and its value as it would have been if it were such as it was represented to be in those particulars in relation to which the false and fraudulent representations were made, on which the verdict was founded:" *Page v. Parker*, 40 N. H. 58. And these instructions are held to be substantially correct, in the opinion formerly delivered in this case, with the qualification that the price paid should be taken as

very strong, though not absolutely conclusive evidence of the value of the property as it was represented to be. This qualification seemed necessary, else the damages might often be much larger than the whole amount of the purchase-money, and the purchaser keep the property beside.

Let us suppose that in a given case the representations should be that the stone from a certain quarry was worth twenty dollars per ton, and would bring that price in the market; that ten dollars per ton would cover all expenses of working, quarrying, and transporting the same to market; that the quarry was extensive enough so that one hundred men could work to advantage upon it all the time, and that they could get out eight and one third tons of the stone per month, each man; that the supply was sufficient to last, when worked at that rate, ten years, without extra expense of working, and that the demand would and must necessarily keep in advance of the supply for that length of time. These being the representations, suppose the purchaser, relying upon them all, and equally upon each, makes the purchase at fifty thousand dollars, and it proves that all these representations are false and fraudulent in every particular, and that the quarry is perfectly worthless; and now the purchaser, having paid his money for the quarry, brings his suit for damages. By what rule shall his damages be assessed? Shall he recover the difference between the value of the quarry as it was represented to be by the vendor and its actual value?

Its value, as represented, could be seen by a brief calculation: eight and one third tons per month is one hundred tons per year for each man. This, multiplied by one hundred, the number of men, gives ten thousand tons per year. This, multiplied by ten, the number of dollars of net profit per ton, gives one hundred thousand dollars per year; and this, for ten years, gives one million dollars. As represented, it was worth that amount. It is actually worth nothing. The damages cannot be the difference between the value as represented and the actual value, as the plaintiff has paid but fifty thousand dollars.

It is evident that, although the plaintiff trusted somewhat to all the representations made, yet he did not do so to the full extent. He trusts so far to the representations that he concludes to pay his fifty thousand dollars for the quarry, and that is all he has been damaged. Hence the necessity of making the price paid strong evidence of the value as repre-

sented to be. In other words, it is the value which the purchaser was induced to put upon the property in consequence of the fraudulent representations made to him; the amount which, by these misrepresentations, he was induced to pay for what has proved to be worthless.

The court, in the former decision, wishing to make this qualification in the instructions of the court at the first trial, did not, by any means, intend to leave out of view the other qualification which was there included, and which is quite as necessary, in a large class of cases, to be observed as any other. The statement of the rule of damages, as stated by the judge who delivered the former opinion in this case, is correct only in connection with the instructions that were given on the first trial, in the court below, as appeared in the case, and which instructions are there said to be substantially correct. The rule of damages, as stated in the former opinion in this case, without the qualification that had been affixed at the first trial below, is said to be the rule in ordinary cases, or "under ordinary circumstances:" *Page v. Parker*, 40 N. H. 72. The same rule had been substantially laid down before in *Fisk v. Hicks*, 31 Id. 535, and numerous cases cited, and has been since repeated in *Carr v. Moore*, 41 Id. 131, and is found in *Stiles v. White*, 11 Met. 356 [45 Am. Dec. 214]. This rule, as stated, is correct in a class, and in much the larger class, of cases, as will be seen by examining the cases cited. Where there is but a single fraudulent misrepresentation, or upon only a single point, or in relation to a single quality or circumstance, there this rule applies, and needs no qualification, except that the price paid is to be evidence of the value as represented to be. And in that class of cases, too, the same rule applies in cases of warranty as in actions for deceit and fraud, as is said in *Stiles v. White*, *supra*; because the defendant cannot claim a more favorable rule of damages on the ground of his own fraud, in an action of deceit, than he would be entitled to upon his promise in a case of warranty. In other words, that less damages were not to be recovered in an action *ex delicto* than in an action *ex contractu* for the same subject-matter.

Take the case of a horse, warranted sound and proving unsound. Then the rule of damages, as stated in *Page v. Parker*, 40 N. H. 72, is correct. And it would be equally so in case the horse were represented sound when known to be otherwise, in an action for deceit and fraud in the sale. But take a case where there are many misrepresentations charged, some

of which may be fraudulent and others not so, though all may be false in fact, and have deceived the plaintiff, and then the rule, as there stated, is not correct, without the further qualification, which was given at the first trial, that the rule of damages was the difference between the real value and the value as it was represented to be in those particulars in relation to which the false and fraudulent representations were made, on which the verdict was founded. And with that qualification, the rule will be the same in cases of warranty and deceit, and will be a general rule that may be applied in all cases.

Now, suppose the plaintiff paid eleven thousand dollars for a piece of property really worth only one thousand; and we will suppose that there were misrepresentations made in regard to the quality of this property in ten different and distinct particulars, all of which were material, and each affected the value of the property equally with every other, and each influenced the purchaser equally in buying the property. Now, if all these misrepresentations were not only falsely but fraudulently made, then the plaintiff should recover as damages, in an action for deceit and fraud in the sale, ten thousand dollars, just the same as he would have been entitled to had the action been upon a warranty in all these ten particulars.

But suppose that these misrepresentations should be found by the jury to have been made fraudulently only in relation to five qualities or particulars, and ignorantly and honestly in regard to the other five particulars. Then, in this action, the plaintiff could recover only five thousand dollars; whereas, in a warranty upon all the ten particulars, he could recover ten thousand dollars. The rule of damages in the two cases is the same only when the warranty covers the same ground, and no more, that the representations in the other case do, which are both false and fraudulent and material; and that is as far as the authorities go. A man cannot complain that he is held to the same rule of damages, in case he fraudulently misrepresents a certain quality of the article sold, that would apply if he had warranted the article in that same particular in regard to which the false and fraudulent representation was made.

In the case before us, there were many misrepresentations alleged, and all were alleged to be false and fraudulent. Now, if the jury had found that all these misrepresentations were material, and also false and fraudulent, then the rule as given would have been correct. But suppose they found that three of the alleged misrepresentations were upon matters immaterial,

that three others were made honestly, though they proved to be false in fact. Then all that the plaintiff could have recovered would be the damages he had suffered in consequence of the four remaining misrepresentations that were material and fraudulent as well as false. And so if the jury had found that the defendants made false and fraudulent representations to the plaintiff in respect to only one material matter affecting the value of the property sold, they should have assessed damages only in relation to that one matter, which would have been in accordance with the instructions asked for by the defendants.

But these instructions, or any others covering the same ground, were not given, but were refused; and the rule of damages given to the jury was the difference between the real value and the value as represented to be, etc.; and no distinction was made between representations on material or immaterial matters, or misrepresentations fraudulently or honestly made.

Although, as we have seen, proper directions had been given as to what it was necessary to prove in order to make the defendants liable to any damages, yet the rule for the assessment of damages was not properly qualified and defined; and taking the instructions given in connection with those refused, the jury could hardly have failed to assess damages for all the misrepresentations made, whether material or otherwise, and whether honestly or fraudulently made.

The instructions given at the first trial, that the measure of damages was the difference in the value of the property as it actually was and its value as it would have been if it were such as it was represented to be in those particulars in relation to which the false and fraudulent representations were made, on which the verdict was founded, were substantially correct, so far as they went; and the qualification in relation to the price paid being evidence of the value of the property as it was represented to be, which was added in the former opinion in this case, needs qualifying as there stated, because we have seen that no damage is recoverable for any misrepresentations upon immaterial matters, however false. The price paid, therefore, must be evidence of the value of the property as it was represented to be, in those particulars only in which the representations were material, whether honestly or fraudulently made.

The motion in arrest of judgment must be overruled, as we see no reason why the present declaration is not sufficient.

Verdict set aside, new trial granted.

NONSUIT WILL BE ORDERED, WHEN AND WHEN NOT: See *Ellis v. Ohio Life Ins. etc. Co.*, 64 Am. Dec. 631; *Phillips v. Brigham*, 71 Id. 227, and note thereto 229; *Parks v. Foster*, Id. 221; *Baker v. Lewis*, 75 Id. 598.

ACTION LIES AGAINST ALL CONFEDERATES FOR FRAUD AND CONSPIRACY IN SALES of real or personal property: *Bostwick v. Lewis*, 2 Am. Dec. 73, and extended note thereto 77-81, on fraud in sale of real estate; *Stiles v. White*, 45 Id. 214; extended note to *People v. Richards*, 51 Id. 85-89, on conspiracies to cheat and defraud.

FRAUDULENT REPRESENTATIONS DEFINED: See extended note to *Bostwick v. Lewis*, 2 Am. Dec. 77; *Emerson v. Brigham*, 6 Id. 118; *Miller v. Howell*, 32 Id. 36; *Mitchell v. Kintner*, 47 Id. 408.

FRAUDULENT CONCEALMENT DEFINED: *Waters v. Mattingly*, 4 Am. Dec. 631; *Beard v. Campbell*, 12 Id. 362; notes to *Juman v. Toulmin*, 44 Id. 463; *Brown v. Gray*, 72 Id. 563.

FRAUD AND DAMAGE ARE BOTH ESSENTIAL in an action for deceit: *Munro v. Gairdner*, 5 Am. Dec. 531; *Hart v. Tallmadge*, 2 Id. 105; *President of Connersville v. Wadleigh*, 41 Id. 214; *Bartholomew v. Bentley*, 45 Id. 596.

FALSE REPRESENTATION OF VALUE, ACTION WILL LIE FOR, WHEN: *Journey v. Hunt*, 1 Am. Dec. 202; note to *Bostwick v. Lewis*, 2 Id. 80; *Saunders v. Hatterman*, 37 Id. 404.

NO ACTION FOR FALSE REPRESENTATION LIES WHERE PARTY IMPOSED UPON MIGHT HAVE ASCERTAINED TRUTH FOR HIMSELF: *Saunders v. Hatterman*, 37 Am. Dec. 404, and note 405, showing when deceit will lie for false representations in sale of land: *Foley v. Cowgill*, 32 Id. 49; *Anderson v. Burnett*, 35 Id. 425; *Newsom v. Jackson*, 71 Id. 206; *Brown v. Gray*, 72 Id. 563.

FALSE REPRESENTATION TO BE GROUND FOR ACTION MUST BE MATERIAL: Note to *Thurston v. Blanchard*, 33 Am. Dec. 710; *Tryon v. Whitmarsh*, 35 Id. 339; *McGar v. Williams*, 62 Id. 739; *Alvarez v. Brannan*, 68 Id. 274; *Fulton v. Hood*, 75 Id. 664; but the misrepresentation of a material fact is fraudulent, whether the one who makes it knows it to be false or not: *Alvarez v. Brannan*, 68 Id. 274; *Tyson v. Passmore*, 44 Id. 181; *Shackelford v. Handley*, 10 Id. 753. So an action will lie for express misrepresentations, whether made fraudulently or by mistake or accident: *Gould v. Mutual Fire Ins. Co.*, 74 Id. 494, and note 498; *Snyder v. Findley*, 1 Id. 193; *Waters v. Mattingly*, 4 Id. 631; *East v. Matheny*, 10 Id. 721; *Munroe v. Pritchett*, 50 Id. 203. But for cases showing that there is no deceit without a *scienter*, see *Staines v. Shore*, 55 Id. 492; note to *Brown v. Gray*, 72 Id. 566, and cases there cited; *Malurin v. Harding*, 59 Id. 401; *Lord v. Colley*, 25 Id. 445. As to when false representations of vendor will not avoid a contract, see *Dugan v. Cureton*, 31 Id. 727. False representation, to be a ground for action, must also have been fraudulently and intentionally made: See cases last cited; *Young v. Covell*, 5 Id. 316; *Tryon v. Whitmarsh*, 35 Id. 339, 343; note to *Zabriskie v. Smith*, 64 Id. 559; and be accompanied by deceit: See cases last cited; *Miller v. Howell*, 32 Id. 36.

ACTION FOR FRAUDULENT REPRESENTATION, generally, will be found discussed in *Emerson v. Brigham*, 6 Am. Dec. 109; *Benton v. Pratt*, 20 Id. 623; *Culver v. Avery*, 22 Id. 586; *Loddell v. Baker*, 35 Id. 358; note to *Saunders v. Hatterman*, 37 Id. 405; *Medbury v. Watson*, 39 Id. 726, and note 733; note to *Wood v. North*, 44 Id. 814; *Stiles v. White*, 45 Id. 214, and note 216; *Munroe v. Pritchett*, 50 Id. 203; *Mitchell v. Zimmerman*, 51 Id. 717; *White v. Merritt*, 57 Id. 527, and note 530; *McGar v. Williams*, 62 Id. 739; *Zabriskie v. Smith*, 64 Id. 551.

MEASURE OF DAMAGES IN DECEIT FOR FALSE REPRESENTATIONS: *Stiles v. White*, 45 Am. Dec. 214, and cases cited in note thereto 216; *Woodward v. Thacher*, 52 Id. 73, and note 75; *Foster v. Kennedy*, *id.* *supra*, post.

DISTINCTION BETWEEN WARRANTY AND FRAUD IN SALES: *Bartholomew v. Bushnell*, 52 Am. Dec. 338, and note 343.

PRICE PAID IS STRONG EVIDENCE OF VALUE of property at time of sale: See note to *Cary v. Gruman*, 40 Am. Dec. 304, and cases there cited.

THE PRINCIPAL CASE WAS CITED in *Kennedy v. Richardson*, 70 Ind. 534, to the point that false representations merely of value, made by the vendor of real estate to his vendee, cannot be made the basis of a claim for damages in the vendee's favor, and against the vendor, either in an original action or by way of recoupment or set-off.

EMERSON v. SIMPSON.

[43 NEW HAMPSHIRE, 475.]

COVENANT IN LEASE, RELATING TO THING NOT IN ESSE, but to be done upon land, does not run with the land and bind the assignee unless he be named in the covenant.

CONDITIONS SUBSEQUENT ARE NOT FAVORED IN LAW, and are to be strictly construed, especially when relied upon to work a forfeiture.

WHERE CONDITION APPLIES IN TERMS TO GRANTEE OR LESSEE, without mention of heirs, executors, or assigns, the condition cannot be broken after the death of the grantee or lessee. If heirs and executors are named, but assignees are not, it will not be broken by any act of an assignee.

WHERE DEED IS MADE UPON CONDITION THAT GRANTEE SHALL FOREVER KEEP UP and maintain a fence on the line between the land conveyed and the grantor's land, the land will not be forfeited because of the fact that the fence is not kept up after the death of the grantee.

WRIT of entry to recover thirteen acres of land in Windham. The demandants, Amos Emerson and others, in 1849, conveyed to George Simpson, his heirs and assigns, the land demanded, by deed containing this condition: "Provided, nevertheless, if the said George Simpson shall neglect to keep up and maintain forever, at his own expense, a good and lawful fence, constructed of wood or stone, on the line between his own land and land of said Amos and James Emerson, then this deed shall be void," etc. Simpson, during his life, kept up a good fence on said line; but he died in 1858, leaving a widow, the defendant, and a minor child his heirs at law. The widow was appointed guardian of the child. After Simpson's death, nothing was done toward keeping up the fence, though the widow was frequently notified that the fence was defective, and was requested to repair it. On June 20, 1861, Amos and James Emerson gave her a written notice that unless she

fulfilled the condition of the deed they would commence an action for the recovery of the land for condition broken. Nothing being done to the fence, the demandants, on July 11, 1861, entered and took possession, in the presence of witnesses, for condition broken, and cut down and carried away a part of the hay growing there. The widow afterwards entered and carried away the rest of the hay. On August 7, 1861, after the demandants had cut and carried away part of the hay, the defendant commenced to repair the fence, when she was notified that the demandants had, on July 11, 1861, entered for condition broken; but she had no previous notice, though she knew that they had cut down part of the hay growing on the land. Demandants then claimed that the land was forfeited, and refused to allow her to build the fence, and prevented her building it.

Stickney, for the plaintiff.

Morrison, Stanley, and Clark, for the defendant.

By Court, BELL, C. J. If this was the case of a covenant, the liability of the defendant to maintain the fence in question might depend upon the fact, which is not shown in the case, whether there was or not a fence around the land conveyed, at the time of the conveyance, according to the distinction taken in *Spencer's Case*, 5 Co. 16, where it was resolved that if the covenant concerns a thing which was not *in esse* at the time of the demise made, but to be done upon the land afterward—for instance, to build a new wall on some part of the premises demised—the covenantor, his executors and administrators, would be bound, but not the assignee if he was not named, for the law would not annex a covenant to a thing which had no being; but if the lessee had covenanted for himself and his assigns, then forasmuch as it was to be done upon the land demised, it should bind the assignee; and the reason given is, that although the covenant did extend to a thing to be newly made, yet as it was to be made upon the thing demised, and the assignee was to take the benefit of it, therefore he should be bound by express words.

This distinction has been always adhered to: Platt on Covenants, 471; Taylor on Landlord and Tenant, 301; Williams on Landlord and Tenant, 290; *Lametti v. Anderson*, 6 Cow. 307; *Thompson v. Rose*, 8 Id. 266; *Allen v. Culver*, 8 Denio, 284; *Tallman v. Coffin*, 4 N. Y. 136; *Sampson v. Easterby*, 9 Barn. & Cress. 505; *Easterby v. Sampson*, 6 Bing. 644; *Doughty*

v. *Bowman*, 11 Q. B. 444; *Congleton v. Pattison*, 10 East, 188; 1 Washburn on Real Property, 330.

Conditions subsequent are not favored in law, says Chancellor Kent (4 Kent's Com. 129), and are construed strictly, because they tend to destroy estates; and a vigorous exaction of them is a species of *summum jus*, and in many cases hardly reconcilable with conscience. If, then, a condition be personal, as that the lessee shall not sell without leave, the executors of the lessee, not being named, may sell without incurring a breach; *Anonymous*, Dyer, 66 a; *Stapleton v. Trewlock*, Moore, 11.

It is a general rule, says the Touchstone, 133, that such conditions annexed to estates as go in defeasance, and tend to the destruction of estates, being odious in the law, are taken—that is, construed or expounded—strictly, and shall not be extended beyond their words, unless it be in some special cases; and therefore if a lease be made on condition that if such a thing be not done, the lessor, without any words of heirs, executors, etc., shall re-enter and avoid it; in this case, regularly, the heir, executor, etc., shall not take advantage of this condition. So if one make a lease for years of a house on condition that if the lessor shall be minded to dwell in the house, and shall give notice to the lessee that he shall depart—in this case, if the lessor die, his heir, executor, etc., shall not have the like advantage and power as the lessor himself, for the condition shall not be extended to them; and hence it is, that if a lease for years be made on condition that the lessee shall not alien without the license of the lessor—in this case, the restraint shall continue only during the lives of the lessor and lessee, and no longer.

The same doctrine will be found in Litt. Ten., sec. 337; Willard on Real Estate, 105; Washburn on Real Property, 447; *Nicoll v. New York and E. R. R.*, 12 N. Y. 131; 1 Smith's Lead. Cas. 99; *McQuesten v. Morgan*, 34 N. H. 400; *Chapin v. School District*, 35 Id. 445; *Ludlow v. New York and H. R. R. Co.*, 12 Barb. 440.

In the case of *Merrifield v. Cobleigh*, 4 Cush. 184, the owner of land made a deed of a part, with the condition that whenever the grantee, his heirs or assigns, shall neglect or refuse to support the fence, the deed shall be void. Shaw, C. J., says such a condition, when relied on to work a forfeiture, is to be construed with great strictness. The demandant shall have his exact legal right, but no more: *Bradstreet v. Clark*, 21 Pick. 389. And the action failed for want of a request, without which there would be neither a neglect nor a refusal.

Upon these principles, it is held that where a condition applies in terms to the grantee or lessee, without mention of heirs, executors, or assigns, the condition cannot be broken after the death of the grantee or lessee. If heirs and executors are named, but assignees are not, it will not be broken by any act of an assignee.

Thus in *Anonymous*, Dyer, 66 a, a question was asked upon the words of a lease, to wit, "and it shall not be lawful for the lessee to give, sell, or grant his estate and term to any person without the leave of the lessor, upon pain of forfeiture of his said term." The lessor and lessee died, and the executors sold the term without license of the heir. It was held that this was not a forfeiture, because the restriction was only during the lives of the lessor and lessee: Cited Com. Dig., tit. Condition, F.

In *Cobb & Prior's Case*, 2 Leon. 35, it is held that if a man devises land to his wife, during the minority of his son, upon condition that she shall not do waste, and dies, and his wife marries again and dies, and after the husband commits waste, the condition is not broken, because a condition to avoid an estate shall be taken strictly: *Cob's Case*, Latch. 20; and *Cobb & Prior's Case*, 2 Leon. 48; and *Cobb v. Prior*, 5 Vin. Abr., tit. Condition, M, a, 8.

In the year-book, 27 H. 8, 14, 15 (Bro. Abr. 151), the case was that the prior of St. Johns leased for years, provided that if said prior, or any of his friars, should wish to inhabit the premises and give a year's notice, the lessee should remove. The prior died, and his successor gave the year's notice; and it was held that as the successor was not named, the condition did not extend to him; and the judges held that if a lease is made upon condition, etc., that the lessor may enter, and do not speak of his heirs or successors; by the death of the lessor the condition is extinct.

In *Dumpor's Case*, 4 Co. 119, S. C., 1 Smith's Lead. Cas. 85, S. C., *sub nom. Dumper v. Syms*, Cro. Eliz. 815, the same strictness is found, where it was held that a condition in a lease for years that the lessee or his assigns should not alienate without license of the lessor, and license was given to make one assignment, the condition would not bind the assignee.

So it was held by two judges in the case in Dyer, 152 a (*Anonymous*), cited in *Dumpor's Case*, 4 Co. 119 b where a proviso in a lease was that the lessee and his executors should not alien to any person without license of the lessor, but

only to one of the sons of the lessee, and the lessee died, and his executors assigned it over to one of his sons, that the son might alien to whom he pleased without license

In *Whitchcot v. Fox*, Cro. Jac. 398, there was a lease for years, with a condition that the lessee should not alien but to his wife during her life, and the residue to his children, or one of his youngest brethren, upon pain of forfeiture; the lessee assigned the term to his brother; it was held the baron might not alien to his wife; therefore, in that point, the condition is void, and thereby liberty is given to alien to his brother, and when he has aliened to him, the condition is dispensed with, and he may alien to whom he pleases.

In *Lynde v. Hough*, 27 Barb. 415, it was held that the extent and meaning of a condition, and the fact of a breach, are questions *strictissimi juris*, and a plaintiff, to defeat an estate of his own creation, must bring the defendant clearly within its letter. And where it was shown that a third person was in the occupation of part of the premises, but it did not appear whether he was in under the lessee himself or under an assignee of the lease, it was held by the court that if he was in under an assignee, it was no breach of a condition that the same, or any part thereof, should not be let or underlet without the written consent of the landlord, under penalty of forfeiture; that the covenant was both collateral and merely personal. It is the engagement of the lessee for himself alone, not naming his assigns, whether actual or legal; and if he had a right to assign the whole term, his assignee takes the estate without the condition — as not being bound by it; and the words “let” and “underlet” do not mean an assignment of the whole term.

In the case before us, the condition is in terms confined to the grantee, “if the said George Simpson shall neglect,” etc., without mention of heirs, executors, administrators, or assigns, and it comes, therefore, fully within the principle of the cases referred to. The condition is personal, and bound George Simpson alone, and no breach is shown during his life.

An argument is drawn from the word “forever,” that the charge of maintaining the fence was intended to be a permanent condition. We think it is more than neutralized by the term “at his own expense,” which limits it to the grantee in person.

Judgment is to be rendered for the defendant, unless one of the parties shall elect a trial by jury.

WHAT COVENANTS RUN WITH LAND: See note to *Fullon v. Stuart*, 15 Am. Dec. 544.

CONDITIONS SUBSEQUENT ARE NOT FAVORED, because they serve to defeat estates: *Taylor v. Sutton*, 60 Am. Dec. 682; *Thompson v. Thompson*, 68 Id. 638, and note 649; and conditions which inure to defeat estates are construed strictly: *Whitton v. Whitton*, 75 Id. 163. Forfeitures are not favored in equity: Id., and note 172.

THE PRINCIPAL CASE WAS CITED in *Barnes v. Union M. F. I. Co.*, 45 N. H. 26, to the point that conditions which go to destroy or divest estates or rights are to be strictly construed; and in *Page v. Palmer*, 48 Id. 387, it was cited to the point that when a grant or reservation is made upon conditions subsequent, the conditions are not favored in law, and are to be strictly construed. Further: that in order to bind the heirs or assigns to the performance of such conditions subsequent, they must be expressly mentioned in the condition. The extent and meaning of a condition, and the fact of a breach, are questions *strictissimi juris*, and a plaintiff, to defeat a condition of his own creation, must bring the defendant clearly within its letter: *Veris v. Renshaw*, 49 Ill. 432, citing the principal case.

FRINK v. FRINK.

[48 NEW HAMPSHIRE, 508.]

CLERK MAY EXTEND RECORDS OF COURT, but only from the process and pleadings on file, and from the minutes and entries on the docket, and not from any extrinsic evidence.

IT IS COUNSEL'S DUTY TO SEE THAT VERDICT IS SIGNED, and that it is for no more than was ordered.

COURT MAY AMEND ITS RECORDS, AND MAKE THEM CONFORM TO FACTS, and truth of the case, even though twelve years have elapsed between the granting of a license and the making up of the record.

COURT MAY RESTORE LEGAL PAPERS which have been improperly altered or defaced, or may substitute new ones where the originals are stolen or lost.

AMENDMENTS OF RECORD MAY BE MADE ACCORDING TO MINUTES OF JUDGE, or upon any competent legal evidence, and the court is the proper judge as to the amount and kind of evidence in each case.

PETITION to amend record. Mrs. Oliva Frink, as the widow of J. N. Frink, brought suit against Darius Frink for the whole of certain tracts of land of which J. N. Frink died possessed. Upon the proof, a question arose as to the extent of plaintiff's interest, and by consent of the parties a verdict was directed for the plaintiff for one half of the demanded premises, the judge reserving the question as to the other half. He afterwards determined that the verdict was correct as directed, and let the judgment stand. The clerk entered upon his docket, "Verdict for the plaintiff," without saying, "for half the premises," and issued writs for the possession of the whole of the premises. The last one bore the return of possession delivered.

This was in 1857. The records were then removed to the supreme court, and in 1860 the present defendant's counsel asked for an extended copy of the record. The supreme court clerk, acting under the direction of the chief justice, neither of whom knew any of the facts further than the record disclosed, extended the record showing a recovery of all the demanded premises; and then, for the first time, entered upon the docket the issuing of the writs of possession. No notice was given to any of the parties. Darius Frink then petitioned the court to have the record amended so as to conform to the facts, and that he be entitled to one half of the land. Smith, the attorney and assignee of Mrs. Frink, claimed to be a *bona fide* purchaser without notice, and that the amendment could not be made without injustice to him. The other facts appear in the opinion.

J. S. H. Frink and Hatch, for the plaintiff.

Smith, for the defendant.

By Court, BELL, C. J. It is part of the ordinary duty of the clerk to extend the records of the court from the process and pleadings on file, and from the minutes and entries on the dockets: *Willard v. Harvey*, 24 N. H. 349. He has the right to regard the entries made, and the process issued by his predecessors, as correct: *Fay v. Wenzell*, 8 Cush. 317; and if, from their inaccuracy, errors are found in the record as extended, the fault is not his. He has no power, and it is no part of his duty, to inquire elsewhere, and he has no right to cite others before him, or to decide upon extrinsic evidence. In this case, the clerk found upon the docket the entry of a general verdict for the plaintiff. He was right in regarding it as a general verdict for the whole of the demanded premises. The proper entry of the verdict, if it was returned for a part only, was, verdict for the plaintiff for half the demanded premises, and for the residue for the defendant. The attempt to cast censure upon the clerk who made the record is groundless. It was the duty of the counsel to his client to see that there was a verdict signed, and that it was for no more than was ordered.

Every court exercising a continuing jurisdiction—having an office for the preservation of its records, and the charge of those records by a proper officer—has, by law, an implied authority to amend its records, to make them conform to the facts and truth of the case: *Remick v. Butterfield*, 31 N. H. 70 [64 Am. Dec. 316]; *Dudley v. Butler*, 10 Id. 284; *Willard v. Harvey*, 24

Id. 344; *Claggett v. Simes*, 31 Id. 23; or, as the same doctrine is well expressed by Fletcher, J., in *Balch v. Shaw*, 7 Cush. 284, there can be no doubt that it is competent for a court of record, under its general inherent and necessary authority, to correct the mistakes and supply the defects of its clerk or recording officer, so as to have the record conform to the actual facts and truth of the case. And this may be done at any time, as well after as during the term. The length of time, in this case (twelve years), between the granting of the license and the making up of the record, does not take away the right or jurisdiction of the court: S. P., *Fay v. Wenzell*, 8 Cush. 317; *Limerick, Petr.*, 18 Me. 186; *Lothrop v. Page*, 26 Id. 121; *Woodcock v. Parker*, 35 Id. 138; *Lewis v. Ross*, 37 Id. 234 [59 Am. Dec. 49]; *Weed v. Weed*, 25 Conn. 337; *Chichester v. Cande*, 3 Cow. 89 [15 Am. Dec. 238]; *Hunt v. Grant*, 19 Wend. 90.

This authority not only extends to the correction of clerical errors, but to the restoration of papers which have been improperly altered or defaced, and the substitution of new ones where the originals are purloined or lost: *Douglass v. Yallop*, 2 Burr. 722; *Hollister v. Judges*, 8 Ohio St. 201 [70 Am. Dec. 100].

It is contended, and so are some of the authorities, that an amendment of a record cannot be made unless there is something to amend by, by which is understood something upon the files or records of the court: *Wendell v. Mugridge*, 19 N. H. 112; *Atkins v. Sawyer*, 1 Pick. 354 [11 Am. Dec. 188]; *Grenville v. Smith*, Cro. Jac. 628; *Mason v. Fox*, Id. 632. But in other cases, such amendments have been made according to the minutes of the judge: *Coughran v. Gutcheus*, 18 Ill. 390; *Brady v. Little*, 21 Ga. 132; *Petrie v. Hannay*, 3 T. R. 659; 1 Tidd's Pr. 661; *Newcombe v. Green*, 1 Wils. 33; S. C., 2 Stra. 1197; *Eddowes v. Hopkins*, 1 Doug. 376; *Tarlton v. Fisher*, 2 Id. 672. Here we have the minutes of the judge and counsel entirely clear upon the point.

But we think it clear, upon the authorities, that the court may make such amendments upon any competent legal evidence, and that they are the proper judges as to the amount and kind of evidence requisite in each case to satisfy them what was the real order of the court, or the actual proceeding before it; what was the proper entry to be made on the docket, and how the record should be extended: *Fay v. Wenzell*, 8 Cush. 317; *Balch v. Shaw*, 7 Id. 284; *Limerick, Petr.*, 18 Me. 186; *Weed v. Weed*, 25 Conn. 337; *Hollister v. Judges*, 8 Ohio St. 201 [70 Am. Dec. 100], before cited.

Where there is nothing more to rely on than mere memory, the court will act, if at all, with great caution: *Porter v. Vaughan*, 22 Vt. 273; *Coughran v. Gutchous*, 18 Ill. 390.

The position that the title has passed into the hands of a *bona fide* purchaser, without notice, signally fails. A letter written by the purchaser only a little more than half a year before his purchase, shows that he then well knew that his sister's title extended to one half the premises only. There is nothing but the singular forgetfulness of right displayed by the claim, which gives any color to the pretense that the facts could be forgotten.

The amendment is allowed.

POWER OF COURTS TO ORDER MISTAKES IN ITS RECORDS TO BE CORRECTED: *Lewis v. Ross*, 59 Am. Dec. 49; *King v. State Bank*, 47 Id. 739; *Galloway v. McKeithen*, 42 Id. 153; *Emery v. Berry*, 61 Id. 622, and note 628; *Houston v. Williams*, 73 Id. 585.

WIGGIN v. WIGGIN.

[43 NEW HAMPSHIRE, 561.]

DEVISE OF CERTAIN ROOMS FOR LIFE, AND OF CERTAIN QUANTITY OF WOOD for fuel, entitles the legatee to sell the wood or to remove and burn it elsewhere.

LEGACY CHARGED ON LAND IS IN NATURE OF ORDINARY DEBT which the owner of the land has promised to pay, and no demand is necessary.

ASSUMPSIT FOR LEGACY WILL LIE AGAINST OWNER OF LAND upon which the legacy is a charge.

TENANT FOR LIFE OF LOWER ROOMS OF HOUSE AND CHAMBERS ABOVE is not obliged to share in the expenses of repairing the roof of the building, unless incurred at his request.

TENANT FOR LIFE OF CERTAIN ROOMS OF HOUSE MAY LET such rooms, and retain the money received as rent.

ASSUMPSIT. Nathan Wiggin died, and bequeathed to his two daughters, Mehitable and Anna, the use of certain rooms of his dwelling-house, a certain annual allowance of provisions, and a sufficient quantity of wood to support one fire, during the time that they, or either of them, should remain unmarried. Hiram Wiggin was the devisee of the land upon which these legacies were charged. Anna married, and plaintiff leased the rooms and resided with her sisters, sometimes one and sometimes ten miles distant. Defendant failed to supply her with the wood or provisions, and would not permit her to take any away from the house. She brought *assumpsit*,

setting up the provisions of the will. Defendant pleaded the general issue, with a set-off, one item of which was, "expense of shingling one-third part of the house occupied by defendant, twenty-five dollars," and another, "cash received for room rent, four dollars." Defendant also objected that the wood and provisions were to be used by plaintiff at the dwelling-house, and that it was not her privilege to remove them.

Andrew Wiggin, for the plaintiff.

Small, for the defendant.

By Court, BELLOWS, J. The main question in respect to the fuel is, whether the plaintiff had a right to use it off the premises, or to sell it. It is clearly provided by the will that the wood was to be delivered at the house of the testator and properly prepared for use there; but there is nothing in the provisions of the will or in the nature of the case inconsistent with its use elsewhere, or the sale of it. If, from infirmity or from motives of economy, it became convenient for the plaintiff to live elsewhere, it would certainly be just that she should be allowed to take with her, or to sell, the corn and other provisions, and the wood also, unless her doing so would be injurious to the defendant and inconsistent with the parent's will.

Of course the plaintiff could not, by a removal from the house, change the place or time of delivery; but when delivered, we think she may sell the wood or use it elsewhere. In this way, she might make it more beneficial to herself without injury to the defendant; and no such injury has been suggested or perceived. And a construction of the will, then, that would allow such change in the mode of the use should be favored; as in the case of the grant of a mill and a right to draw water for the same; in which case it is well settled that the grantee may draw the same quantity for any other kind of mill: *Johnson v. Rand*, 6 N. H. 22; *Whittier v. Cocheco Mfg. Co.*, 9 Id. 454 [32 Am. Dec. 382].

It is suggested by the defendant's counsel that the plaintiff must be regarded as tenant for life of the rooms described, with the right to wood to burn there, and that therefore she cannot sell it or burn it elsewhere. But we think the wood is not to be regarded as an incident to the tenancy of these rooms, any more than the money, corn, or other provisions; on the contrary, we hold that, without occupying these rooms at all, the legatees would be entitled to the other things, as independent bequests. Where the right to estovers is a mere incident to

an estate in the land, as in the case of a mere tenancy for life or in dower, the law has been otherwise: although in respect to dower, it is now changed by statute. These general views are recognized in *Fiske v. Fiske*, 20 Pick. 499, which is cited for the plaintiff. There, a husband, by his will, gave to his wife a certain room in his house, and other privileges, during her life; and a son, after the testator's death, mortgaged to the widow certain real estate, with a condition, among other things, to send her fire-wood for one fire, to be drawn and cut at the door, fit for use. The court held that the mortgagor was bound to furnish the wood at such place as she should make her residence, provided it should be within a reasonable distance; and the circumstance that the house was destroyed by fire did not exempt him from his obligation to furnish the wood.

In respect to the corn, there is no evidence of any demand on the one hand, or offer to deliver it on the other, at any place. In *Pickering v. Pickering*, 6 N. H. 120, which was a suit against a devisee to recover a legacy of twenty dollars annually, charged on the land, it was decided that, by accepting the devise, the devisee became a debtor by reason of the land for the legacy; and like any other debtor, is bound to pay without a demand; and that he stood upon the same ground as if he had expressly promised to pay; and the plaintiff in *assumpsit* was allowed to recover. So, in *Veazey v. Whitehouse*, 10 Id. 409. In the former case, the court distinguish between a suit against a devisee and an executor for a legacy, holding that in the latter a demand is necessary. The case before us is like that of *Pickering v. Pickering*, *supra*, except here the legacy was payable in specific articles, while in that case it was payable in money; but we think the same principle must apply, namely, that as respects the devisee, the legacy stands upon the footing of an ordinary debt which he has promised to pay; and the question then is, whether in the case of a promise to pay or deliver five bushels of corn yearly and every year, a demand before suit is necessary. In this case, the time of payment is fixed, and it is incumbent on the defendant, generally, to deliver the corn at the place appointed, or to show a readiness to do so; or if none is appointed, then to seek the plaintiff and have her fix upon a reasonable place. In neither case is a demand necessary: Co. Lit. 210 b; 2 Kent's Com. 505, 507, and cases; *Lobdell v. Hopkins*, 5 Cow. 516; *Goodwin v. Holbrook*, 4 Wend. 380; *Aldrich v. Albee*, 1

Me. 120 [10 Am. Dec. 45]; *Bixby v. Whitney*, 5 Id. 192; *Bean v. Simpson*, 16 Id. 49; *Howard v. Miner*, 20 Id. 325; *White v. Perley*, 15 Id. 470, where it is expressly held that a demand in such case is not necessary; and to the same effect is *Smith v. Loomis*, 7 Conn. 110; 1 Ch. Pl. 330; Chit. Con., 9th Am. ed., 730, note; 2 Greenl. Ev., sec. 609, 610, and note; *Currier v. Currier*, 2 N. H. 75 [9 Am. Dec. 43]. Upon the facts stated, then, an action of *assumpsit* can be sustained for not delivering the corn and wood: *Pickering v. Pickering*, 6 Id. 120; *Veazey v. Whitehouse*, 10 Id. 409; *Smith v. Jewett*, 40 Id. 530.

The only question, then, as to the plaintiff's right to recover is, whether the action can be maintained on this declaration. The special count sets out the entire bequest to the plaintiff and her sister; the devise to the defendant, making him the residuary devisee; the condition by which the plaintiff became entitled to the whole bequest to herself and sister; the promise by the defendant to pay and perform according to the bequest; and his neglect and refusal to pay and deliver to the plaintiff the various articles, enumerating them, as provided by the will; and we see no objection to it. Under this declaration, the defendant objected that evidence of his refusing to allow the plaintiff to take away wood was incompetent; but we do not see upon what ground, inasmuch as it tends to prove a refusal, as well as neglect to deliver the wood, and to this there can be no objection.

The only remaining question is in respect to the set-off for expense of shingling her part of the house, and cash received by her for rent of rooms. On this point, it appears that the will gives the plaintiff the use and occupancy, during her life, of the westerly lower room in the testator's house, the chamber over it, and the northerly front lower room; and the defendant is the owner of the reversion, and also of the rest of the house. It is claimed by the defendant's counsel that the plaintiff and defendant are like tenants in common, and that she is bound to repair her part of the house. If this were so, we find no authority that would sanction the making of the repairs by one tenant, without the request of the other, and the recovery of a share of the expense in *assumpsit*. In such cases, the remedy at common law is by writ *de reparatione facienda*: Co. Lit. 54 b, 200 b; *Bowles's Case*, 11 Co. 82; *Tenant v. Goldwin*, 1 Salk. 380; 4 Kent's Com. 370. So where one's house is ruinous and likely to fall on his neighbor's house, the same remedy is said to exist: Co. Lit. 56 b, and cases cited; and an action on the

case will lie for the neglect to repair, by reason of which his neighbor's house is injured: *Id.*, note 2; and *Fitzh. N. B.*, 127, note *a*. But here the parties are not tenants in common at all; but the plaintiff is seised of certain rooms and the defendant of the remainder of the house; and in legal contemplation each has a distinct dwelling-house, although they are adjoining; and no authority is cited or found that would sustain an action at law, by one against the other, to recover for repairs made without request. In *Loring v. Bacon*, 4 Mass. 575, the defendant was seised of a lower room and cellar under it, and the plaintiff of the chamber above and the remainder of the house; and repairs to the roof being necessary, the defendant, on request, refused to join in making them; whereupon the plaintiff made them and brought *assumpsit* for a share of the expense. It was held, upon full examination of the authorities, that the action would not lie, and that the defendant was not bound to contribute to the expense; but the case stood like that of owners of separate but contiguous houses or mills, where the appropriate remedy, in case one suffers his building to become ruinous and to endanger or injure the other, is by writ *de reparatione facienda*, or action on the case. So in *Cheeseborough v. Green*, 10 Conn. 319 [26 Am. Dec. 396], where the plaintiff owned and occupied the foundation and first and second stories of a building, and the defendant the third story and roof, which had become leaky and ruinous, whereby the plaintiff's goods were injured, it was held that an action on the case would not lie, but the remedy must be sought in equity: See also *Campbell v. Mesier*, 4 Johns. Ch. 334 [8 Am. Dec. 570], and 4 Kent's Com. 371-412, and notes. Upon these views, we are of the opinion that this item of the set-off cannot be sustained.

We are also of the opinion that the defendant is not entitled to recover the amount of the rent received by the plaintiff for her rooms. Whether the plaintiff has the right to let the rooms to another without the assent of the defendant or not, we think he has no such interest in them during the life of the plaintiff as to entitle him to the use of them in her absence, or to the rent, if leased to another. The use and occupancy of the rooms are given to the daughters to live in during their lives, and while single, and during that period the defendant has no right to the use of them, as we conceive, under any circumstances, nor to any profits to be derived from their use.

These views are to be certified to the trial term.

RIGHTS OF TENANT FOR LIFE IN PERSONALTY: See *Saunders v. Haughton*, 57 Am. Dec. 581, and note 583; *Braswell v. Morehead*, Id. 586, and extended note thereto on the subject 587-590.

RIGHT OF TENANT FOR LIFE TO ASSIGN OR UNDERLET: See extended note to *Miles v. Miles*, 64 Am. Dec. 369.

LIFE TENANT, WHEN AND WHEN NOT BOUND TO REPAIR: *Clemence v. Steere*, 53 Am. Dec. 621.

LEGACY CHARGED ON LAND, ACTION FOR: *Brown v. Furer*, 8 Am. Dec. 693, and note 695. As to recovery of legacy by *assumpsit*, see *App v. Dreisbach*, 21 Id. 447; note to *McLanahan v. Wyant*, Id. 369.

DEVISEE BECOMES PERSONALLY LIABLE for legacies, where he has accepted a devise conditioned on paying legacies; but such legacies remain chargeable on the land, notwithstanding the devisee's personal liability: *Birdsall v. Hewlett*, 19 Am. Dec. 392.

PATRICK v. FARMERS' INSURANCE COMPANY.

[43 NEW HAMPSHIRE, 621.]

THAT NOTICE OF LOSS SHALL BE GIVEN WITHIN LIMITED TIME is a valid stipulation in a policy of insurance. This clause may be inserted in the policy itself, or contained in the charter of the company. In either case, it is a condition precedent.

DEFECT IN TIME OF GIVING NOTICE STANDS ON DIFFERENT GROUND FROM DEFECT IN ITS MATTER. The defect, upon notice, may be remedied, but it is otherwise as to the time, which is necessarily irremediable, if the insurer chooses to insist upon it.

VOTE BY DIRECTORS OF INSURANCE COMPANY TO INDEFINITELY POSTPONE SUBJECT OF LOSS WILL BE CONSTRUED as a refusal to allow anything on account of it, rather than as a refusal to ascertain and determine the amount of the loss or damage.

CONDITION IN POLICY OF INSURANCE REQUIRING NOTICE OF LOSS TO BE GIVEN WITHIN THIRTY DAYS is not waived by a vote of the directors of an insurance company to indefinitely postpone the subject of a loss which is construed as a refusal to allow anything on account of it.

STIPULATION IN POLICY, OR BY-LAW OF INSURANCE COMPANY, THAT NO RECOVERY SHALL BE HAD UNLESS SUIT IS BROUGHT within a certain time is a valid condition, and unless it is complied with, there can be no recovery. Such a stipulation is in the nature of a condition precedent to the company's liability.

ONE INSURED CANNOT RECOVER FOR LOSS IF HE HAS FAILED TO GIVE NOTICE OF IT, in compliance with the charter of the insurance company as to time, and neglects to commence his action within the time limited by the charter.

NOTICE BY PAROL TO AGENT OF INSURANCE COMPANY IS OF NO EFFECT, where the charter contains a condition requiring notice of the loss to be given in writing to the secretary, or one of the directors.

ASSUMPSIT on a policy of insurance. The charter of the insurance company required the insured to give notice of loss, in writing, to at least one of the directors, or the secretary of

the company, within thirty days after it was sustained. The charter also required the directors to ascertain and determine the amount of the loss or damage. It further required suit to be brought within a limited time, depending upon the next term of court. Defendants had insured the plaintiffs' house and other property by a policy dated October, 1853, which referred to the charter. On December 19, 1855, the house was destroyed by fire. The plaintiff gave notice of his loss to the company on August 21, 1856. On September 2, 1856, the secretary replied that the board of directors had voted to indefinitely postpone the subject. Suit was brought April 6, 1859. On January 2, 1856, the plaintiff had a conversation with one Emery, an agent of the company, in regard to the loss, and at that time signed upon the back of the policy this request: "I wish to have this policy discharged," and delivered the policy to Emery, who passed it in at the office of the company, where the following entry was made by the secretary under the request: "Received at office, March 29, 1856; discharged."

F. R. Chase, for the plaintiff.

L. D. Sawyer, for the defendants.

By Court, BELL, C. J. We are not aware that any doubt has been entertained of the validity of a stipulation in a policy of insurance that notice shall be given of a loss within a limited time. When such a clause is inserted in a policy itself, it generally assumes in its terms the form of a condition precedent, until the performance of which, no obligation arises to make good the loss. In other cases, as in this, the provision may be contained in the charter of the company. In either case, the nature of the provision is such that it must be wholly inoperative if it is not construed as a condition precedent; so that the questions which have been decided by the courts have been chiefly as to what constitutes a compliance with the condition: *Bumstead v. Dividend Ins. Co.*, 12 N. Y. 81; *Schenck v. Mercer Co. Ins. Co.*, 24 N. J. L. 447; *Bilbrough v. Metropolis Ins. Co.*, 5 Duer, 587; *Francis v. Somerville Ins. Co.*, 25 N. J. L. 78; *Kernochan v. New York Bowery Ins. Co.*, 17 N. Y. 428; *Clark v. New England Ins. Co.*, 6 Cush. 342 [53 Am. Dec. 44].

The charter requires that notice shall be given, in writing, of the loss, to the directors, or one of them, or to the secretary, within thirty days after the loss. Notice of this loss, occurring December 19, 1855, was given to the company August 21, 1856. This notice was not in compliance with the charter as to time,

however it might be in other respects. It was more than seven months after the loss. But it is said this defect is of a class which may be waived. Every one may renounce a law which is made for his benefit: Broom's Legal Maxims, 547; *Beawfage's Case*, 10 Co. 101. Any notice whatever may be waived, any informality in it, or neglect of due time: *Ætna Ins. Co. v. Tyler*, 16 Wend. 401 [30 Am. Dec. 90]; *Kernochan v. New York Bowery Ins. Co.*, 17 N. Y. 433.

It is claimed that the letter of the secretary, that "the directors had voted indefinitely to postpone the subject," is a waiver of any objection to the time of the notice; that if the company intended to insist upon the want of seasonable notice, they should have expressly disallowed the claim on that ground.

The authorities are quite distinct, that if the notice given is defective or erroneous, and the insurance company put their refusal to pay the loss on other grounds, that is a waiver of this condition of the contract: *Bumstead v. Dividend Ins. Co.*, 12 N. Y. 81; *Schenck v. Mercer Co. Ins. Co.*, 24 N. J. L. 447; *Bilbrough v. Metropolis I. Co.*, 5 Duer, 587; *Francis v. Somerville Ins. Co.*, 25 N. J. L. 78. An objection of error in the notice, not suggested till the trial, was held to be waived: *Kernochan v. New York Bowery Ins. Co.*, 17 N. Y. 428; *Clark v. New England Ins. Co.*, 6 Cush. 342 [53 Am. Dec. 44]; *Peoria M. & F. Ins. Co. v. Lewis*, 18 Ill. 553; *Underhill v. Agawam M. F. Ins. Co.*, 6 Cush. 445; *Vos v. Robinson*, 9 Johns. 192; *Ætna Ins. Co. v. Tyler*, 16 Wend. 401 [30 Am. Dec. 90]; *Heath v. Franklin Ins. Co.*, 1 Cush. 257, 264; *Noyes v. Washington Co. Ins. Co.*, 30 Vt. 659.

In none of these cases does the objection of defective notice go to the time of giving it. They all relate to some deficiency of the matter, or form of the notice, and they generally treat it as not acting in good faith on the part of the insurer, that he should not give notice of a defect which there was time to remedy: *Kernochan v. New York Bowery Ins. Co.*, 17 N. Y. 433.

A defect in the time of the notice stands on different ground from a defect in its matter; while the last, upon notice, may be remedied, it is otherwise with the former; which is necessarily irremediable, if the insurer chooses to insist upon it. It may be waived, but it would be reasonable to require a different kind of evidence from that which ought to be satisfactory in cases of mere defect of form. The silence of an insurance company, upon a defect in the form of the notice, might be very injurious to the assured, but it is not at once seen how

the assured could be benefited by notice that he had failed to give information of his loss within the stipulated time, or how he could be prejudiced by the omission.

The directors of the insurance company do not do as we think they ought always to do, decide distinctly the question referred to them by the charter, that is, "ascertain and determine the amount of the plaintiff's loss or damage," but seem, in form, to decline to act on the subject. "Their vote was to indefinitely postpone the same." No reason is assigned for this course, and it does not therefore fall within the class of cases where the company refuse to pay the loss for other reasons than the defects of the notice, and we think no inference can be drawn that the company intended to waive any ground of defense, and that no waiver of any other than merely formal grounds can be fairly inferred from their silence.

The form of this vote is ambiguous as to the effect. If regarded as a refusal to decide, its effect would be very different from a refusal to allow the claim, and we think the vote in this case may be regarded rather as a refusal to allow anything on account of the claim than as a refusal to ascertain and determine the amount of the loss or damage. In legislative bodies, from which this phrase is borrowed, an indefinite postponement is regarded as a denial of the claim.

This question may be regarded as material in connection with the next question of the case, whether the suit was seasonably commenced. In *Nute v. Hamilton Ins. Co.*, 6 Gray, 177, it is held that a stipulation in a policy or by-law, by way of condition precedent to their liability, that no recovery shall be had unless suit is brought within a certain time, is a valid condition, and unless it is complied with, there can be no recovery; and it is said it had been so held in cases recently decided; and the same point was decided in *Amesbury v. Bowditch M. Ins. Co.*, Id. 596; *Fullam v. New York Ins. Co.*, 7 Id. 61 [66 Am. Dec. 462]; *Wilson v. Aetna Ins. Co.*, 27 Vt. 99; *Brown v. Roger Williams Ins. Co.*, 5 R. I. 394; *Cray v. Hartford Ins. Co.*, 1 Blatchf. 280; *North-western Ins. Co. v. Phenix Oil and Candle Co.*, 31 Pa. St. 448. These authorities seem to us to be decisive that such a stipulation, as to the time of bringing the action, is valid.

In the case of *Nevins v. Rockingham Ins. Co.*, 25 N. H. 22, it was determined, agreeably to the decision in *Boynnton v. Middlesex M. Ins. Co.*, 4 Met. 212, that under the charter of an insurance company similar to that of the defendants, if the

directors do not proceed to act on the question of the amount of a loss within three months after it has been duly notified to them, the assured may bring his action to recover the loss; and in such case the provisions of the charter, requiring the action to be brought at the next term of the court, do not apply; the court holding that these provisions all appear to contemplate a case where a loss has been admitted, and the amount fixed by the directors, and the only question is, whether the insured is entitled to recover more. But in Vermont, it has been held that the provision applies equally to the case where the directors have duly and seasonably considered the question of loss and determined to pay nothing: *Williams v. Vermont M. F. Ins. Co.*, 20 Vt. 222; *Dutton v. Vermont M. Ins. Co.*, 17 Id. 369. These decisions seem to us to be founded in sound reason, and the decisions there and here may well stand together, as to the points decided. It was not necessary, in the case here, to determine the latter question, since on either view that action was well brought, and it was left by the court undecided.

The policy of the charter seems to be to provide for a speedy settlement of claims for losses, which must unavoidably be productive of serious inconvenience to all concerned, if long left in an unsettled condition; and this evil is quite as great where the directors have refused to allow anything in a case of loss as where they have allowed a sum too small to satisfy the claimant. The directors have in both cases performed their duty, so that in that respect the company is chargeable with no fault.

We are, therefore, of opinion that the plaintiff is bound by his neglect to give seasonable notice of his loss, as well as by the neglect to commence his action within the time limited by the charter. We think the notice to Emery can avail nothing. It was not in writing, and was not made to any of the directors, or the secretary; and its sole purpose seems to have been to obtain a discharge of the policy.

Judgment for the defendants.

DEFECT OR INSUFFICIENCY OF NOTICE OF LOSS, what is deemed to be a waiver of by insurer: See note to *Trask v. State Fire etc. Ins. Co.*, 72 Am. Dec. 624; *Clark v. N. E. Mut. Fire Ins. Co.*, 53 Id. 44. Insurer, by receiving notice of loss without making objection to its not being given in time, does not thereby waive such notice: *St. Louis Ins. Co. v. Kyle*, 49 Id. 74.

PARTIES TO CONTRACT OF INSURANCE MAY, BY EXPRESS STIPULATION, LIMIT TIME within which an action must be brought thereon to a shorter

period than that prescribed by the general statute of limitations: *Fullam v. New York Union Ins. Co.*, 66 Am. Dec. 462, and note 464.

NOTICE TO AGENT IS NOTICE TO PRINCIPAL: See note to *Worcester Bank v. Hartford F. I. Co.*, 59 Am. Dec. 146.

THE PRINCIPAL CASE WAS CITED in *Leach v. Republic Fire Ins. Co.*, 58 N. H. 246, to the point that a stipulation in a policy of insurance, limiting the time within which a suit may be brought, is valid and binding on the assured. In *Tasker v. Kenton Ins. Co.*, Id. 469, the principal case was cited to the point that such a stipulation is in form and effect a condition precedent, and that unless it is complied with, there can be no recovery at common law. And in *Cornell v. Milwaukee Mut. Fire Ins. Co.*, 18 Wis. 392, that where the time for giving notice has already elapsed, the case is unlike one where the notice is defective in some matter which can be remedied if objection is taken. In the former case, the defect is incurable, while in the latter it is not. Good faith on the part of an insurance company requires it to take its objection to a defective notice when there is time to remedy it, so that the defect may be removed. But it is under no obligation to object to a notice which has been given after the limited time has elapsed. It was there also cited to the last point in the *syllabus, supra*.

DICKINSON v. DAVIS.

[43 NEW HAMPSHIRE, 647.]

AT COMMON LAW, WIFE COULD NOT BE TRUSTEE OF HER HUSBAND.

WHERE HUSBAND PURCHASES LAND IN HIS WIFE'S NAME, proof that part of the purchase-money belonged to the husband will not make the wife chargeable as his trustee.

PRESUMPTION OF TRUST ARISES IN FAVOR OF ONE WHO PAYS PURCHASE-MONEY OF LAND, when it is conveyed to a stranger, but such a presumption is rebutted in case the purchase can fairly be deemed to have been made for another, from motives of natural love and affection. Thus a purchase by a parent in the name of a child is deemed *prima facie* an advancement from which no trust results; and the presumption that such a purchase is intended for a provision is stronger in the case of a wife than of a child.

LAND PURCHASED BY HUSBAND IN WIFE'S NAME IS DEEMED PRIMA FACIE to be intended as a provision for the wife, so as to rebut the presumption of a resulting trust to the husband.

DOCTRINE OF RESULTING TRUSTS "has its origin in the natural presumption, in the absence of all rebutting circumstances, that he who supplies the money means the purchase to be for his own benefit, rather than that of another; and that the conveyance in the name of the latter is a matter of convenience, or arrangement between the parties for other collateral purposes;" but this reason fails to apply to a purchase in the name of a wife or child, because there is *prima facie* a presumption of benefit intended for such.

HUSBAND HAS AT MOST BUT LIFE ESTATE IN WIFE'S LANDS, and upon their sale the whole proceeds belong to the wife, unless reduced to possession by her husband.

WHERE MONEY RAISED BY MORTGAGE OF WIFE'S LAND IS HELD BY HER,
and the husband has not assumed the mortgage debt, or attempted to control the money borrowed, she is not liable in foreign attachment as trustee of her husband on account of such money.

TRUSTEE process. It appeared from the trustee's disclosure that she was the wife of the principal defendant, and that she received from the administrator of her father's estate about twelve hundred dollars, which she held in her own right, and managed as she pleased, her husband never having interfered or reduced it to his possession. J. F. Davis, her husband, had some years before the bringing of this suit paid fifty dollars for a horse, but it did not appear from the disclosure whether it was the money of the trustee or the money of the husband. Davis exchanged this horse for another, for which he paid seventy dollars as boot. This was the money of his wife, the trustee. Davis exchanged the last-named horse for a stud-horse, which he sold as the wife's horse for nine hundred dollars. Five hundred dollars of this sum was deposited in the Bank of Black River, in the name of J. F. Davis, at the order, the wife said, of Fanny Davis. This five hundred dollars, with about three hundred dollars more received for the horse, together with six hundred and fifty dollars belonging to the wife, was used in the purchase of real estate, which the wife afterwards exchanged for other real estate, since held by her. The deeds of all the real estate were made to or by Mrs. Davis. The sum of eight hundred dollars was raised by a mortgage on the last-named place, and Mrs. Davis loaned six hundred dollars of it to one Martin, upon his note to her, which she continued to hold. The question reserved for the opinion of the court was, Could Mrs. Davis be charged as the trustee of her husband?

Baker, for the plaintiff.

Parker, for the trustee.

By Court, **BARTLETT, J.** We need not inquire whether there is sufficient proof that part of the purchase-money of the real estate belonged to the husband: *Page v. Page*, 8 N. H. 202; for if such were the fact, it would not make the wife chargeable as his trustee. It is true that there arises a presumption of a trust in favor of one who pays the purchase-money of land when it is conveyed to a stranger, but such a presumption is rebutted in case of purchase can fairly be deemed to have been made for another, from motives of natural love and

affection: 2 Story's Eq. Jur., sec. 1202; *Baker v. Vining*, 30 Me. 128. Upon this ground, a purchase by a parent, in the name of a child, is deemed *prima facie* an advancement from which no trust results: 2 Story's Eq. Jur., sec. 1202; *Page v. Page*, 8 N. H. 202; Atherly Set. 473; Reeves's Domestic Relations, 308. It is difficult to see why the same principal should not be applied to purchases by a husband in the name of his wife. Story says that the presumption that such a purchase is intended for a provision is stronger in the case of a wife than of a child, for at common law the wife could not be the trustee of her husband: 2 Story's Eq. Jur., sec. 1204. According to the current of authorities elsewhere, land purchased by the husband in the name of the wife is deemed *prima facie* intended as a provision for the wife, so as to rebut the presumption of resulting trust to the husband: 1 Greenl. Cru. 402; 2 Fonbl. Eq., b. 2, c. 503; *Back v. Andrew*, 2 Vern. 120; *Kingdon v. Bridges*, Id. 67; *Glaister v. Hewer*, 8 Ves. 199; *Dummer v. Pitcher*, 2 Myl. & K. 262; *Rider v. Kidder*, 10 Ves. 367; 2 Mad. Ch. 101; Sugden on Vendors, 453, 621; *Guthrie v. Gardner*, 19 Wend. 414; *Jencks v. Alexander*, 11 Paige, 619; *Welton v. Divine*, 20 Barb. 9; *Whitten v. Whitten*, 3 Cush. 197; *Wallace v. Bowens*, 28 Vt. 638; *Smith v. Strahan*, 16 Tex. 314 [67 Am. Dec. 622]; *Alexander v. Warrance*, 17 Mo. 228; Burton on Real Property, 470; Lewin on Trusts, 85.

This view seems supported by *Farley v. Blood*, 30 N. H. 354, 372; see also *Marshall v. Pierce*, 12 Id. 131, and *Campbell v. Wallace*, 12 Id. 367 [37 Am. Dec. 219].

In *Pembroke v. Allenstown*, 21 N. H. 107, without adverting to the distinction between the cases of a wife or child and a stranger, the court held that where a husband purchased land in the name of his wife, a trust resulted in his favor. The question then was, whether the husband had gained a settlement, under our pauper laws, by the ownership of real estate. Whether the nature of the question, or the other facts stated in that case, may not render that decision sustainable on other grounds than the broad ones stated, we need not inquire. The decision in *Farley v. Blood*, 30 Id. 354, pronounced by the same justice who gave the opinion in *Pembroke v. Allenstown*, 21 Id. 107, shows, we think, that the latter case could hardly have been regarded as decisive upon the general question: *Tebbetts v. Tilton*, 31 Id. 283, seems to have been decided solely upon the authority of *Pembroke v. Allenstown*, 21 Id. 107. The case of *Hall v. Young*, 37 Id. 134, is

quite distinguishable, for there the conveyance was taken to a stranger, part of the consideration being paid by the wife and part by the husband. Under this state of authorities in New Hampshire, we cannot regard the question as settled by *Pembroke v. Allenstown*, 21 Id. 107, and *Tebbetts v. Tilton*, 31 Id. 283. In neither of those cases was the distinction recognized in the books alluded to by the court, and we have no reason to suppose that their attention was directed to it. The doctrine of resulting trusts "has its origin in the natural presumption, in the absence of all rebutting circumstances, that he who supplies the money means the purchase to be for his own benefit, rather than that of another; and that the conveyance in the name of the latter is a matter of convenience or arrangement between the parties for other collateral purposes:" 2 Story's Eq. Jur., sec. 1201.

This reason fails to apply to a purchase in the name of a wife or child, because there is *prima facie* a presumption of benefit intended for such. The rule generally adopted seems to us established on satisfactory grounds, and we see no reason for departing from it in this state, supported, as it seems to be, by *Page v. Page* [not reported], and *Farley v. Blood*, 30 N. H. 354. In the present case, there is no evidence of a fraudulent intent on the part of the husband, or that the plaintiff was a creditor at the time of the transactions in question, and they must be deemed valid as to him. The husband has at most but a life estate in the lands, and upon their sale the whole proceeds would belong to the wife, unless reduced to possession by her husband: *Coffin v. Morrill*, 22 Id. 359. We see no reason why the money raised upon the mortgage should be subject to a different rule, as we find no evidence that the husband has assumed the mortgage debt, or attempted to control the money borrowed: Id. 360. If, as the plaintiff suggests in his brief, the land was conveyed to the separate use of the wife, the case would stand no better for him. There is no evidence of any express contract by the wife to pay for any services by the husband; and if she could incur a debt to him, perhaps there would be no stronger reason to imply an indebtedness in her case than in the case of a child after majority: *Munger v. Munger*, 33 Id. 581. But even if such an indebtedness existed, there is nothing by which the court could fix its amount: *Bean v. Bean*, Id. 279. It is therefore unnecessary to inquire whether the wife can at law, under any circumstances, become a debtor to her husband, or be held as

not sufficient, it having been served personally upon the defendant at Philadelphia, and not at Cape Island, where the property was situate; 3. That the evidence did not show a sufficient taking to entitle the plaintiff to a verdict on the issue of *non cepit*.

If the last point be well taken, it disposes of the case. It will be first considered.

Until the decision of *Haythorn v. Rushforth*, 19 N. J. L. 160 [38 Am. Dec. 540], it was not an open question in New Jersey whether replevin would lie for a mere unlawful detention. In *Bruen v. Ogden*, 11 Id. 370 [20 Am. Dec. 593], Ewing, C. J., adopted and approved of the doctrine established by the supreme court of New York in *Pangburn v. Partridge*, 7 Johns. 140 [5 Am. Dec. 250]; *Thompson v. Button*, 14 Id. 84; *Clark v. Skinner*, 20 Id. 465 [11 Am. Dec. 302]; *Marshall v. Davis*, 1 Wend. 109 [19 Am. Dec. 463]; *Meany v. Head*, 1 Mason, 322. In the last case, Story, J., said: "At common law, a writ of replevin never lies unless there has been a tortious taking, either originally or by construction of law, by some act which makes the party a trespasser *ab initio*." This remark is cited by Chief Justice Ewing, in *Bruen v. Ogden*, *supra*, as a true statement of the law.

This case of *Bruen v. Ogden*, *supra*, turned upon the question whether the remedy by replevin was not confined to cases of distress, instead of extending to all cases of unlawful taking, and the ruling was that it was not. That has always been the point principally controverted.

There can be no doubt that the remedy was originally devised as a counter-remedy to that of distress, which was by act of the party, and liable to abuse. It was so considered by 3 Bla. Com. 146, but was soon extended to all cases where the custody of goods had been changed by the wrongful act of one of the parties: Com. Dig., tit. Replevin, A; 2 Roll. Abr., tit. Replevin, B. The theory of the action applied to all cases where there had been a forcible change of the possession of chattels.

The object of this writ was to restore the possession to the party who had been deprived of it *in invitum* on his giving a pledge to return, if return should be adjudged, and the defendant was required to justify by avowry or cognizance the taking, by showing his authority to take the goods.

The declaration in replevin charges a taking and detention. The plea of *non cepit* seems to prove, as it puts the party upon

proof of a taking by its very terms, and is a good answer to the declaration, that there must be a taking as the ground of the action. I am not able to see why such a plea should be an answer to the declaration if it does not put the plaintiff to the proof of what it denies. If an unlawful detention is sufficient, why can no precedent be found of such a plea as *non detinet*?

The decided cases in England, where the point has been distinctly raised and argued, all hold a wrongful taking necessary to the maintenance of the action. So also in Ireland: *Ex parte Chamberlain*, 1 Sch. & Lef. 320; *Shannon v. Shannon*, Id. 324; *In re Wilsons*, Id. 320, decided by Lord Redesdale upon great advisement and conference with the other judges.

In *Galloway v. Bird*, 4 Bing. 299, which was an action where the goods had been delivered upon a contract, Best, C. J., delivering judgment, said the authorities all lay it down that replevin can only be maintained where goods are taken, and not where they are delivered upon a contract; and this is clear upon the form of the pleading, which is, that the defendant took and detained the goods, the plea to which allegation is *non cepit*. No instance can be found in the digests or abridgments of replevin having been brought upon a delivery under a contract. That case is like this in this material point: here the furniture was put into the possession of the defendant by the plaintiffs.

The last occasion on which the point has been agitated in Westminster Hall was in *Mennie v. Blake*, 6 El. & Bl. 843, decided in 1856, when the subject was ably and thoroughly discussed by Justice Coleridge. The conclusion reached is that replevin is not maintainable, unless in a case in which there has been first a taking out of the owner's possession.

The supreme court of New York uniformly held this doctrine until it was altered by statute: *Pangburn v. Partridge*, 7 Johns. 140 [5 Am. Dec. 250]; *Hopkins v. Hopkins*, 10 Id. 373; *Thompson v. Button*, 14 Id. 87; *Gardner v. Campbell*, 15 Id. 402; *Marshall v. Davis*, 1 Wend. 109 [19 Am. Dec. 463]. So in Alabama: *Wheelock v. Cozzens*, 6 How. (Miss.) 279; *Cummings v. MacGill*, 2 Murph. 357. In Illinois: *Wright v. Armstrong*, 1 Breese, 130. In North Carolina: *Cummings v. McGill*, 2 Tayl. 98.

In Massachusetts the rule is the other way. There, an unlawful detention has been held sufficient: *Badger v. Phinney*, 15 Mass. 359 [8 Am. Dec. 105]; *Baker v. Fales*, 16 Id. 147.

In the last case, Mr. Justice Putnam made an earnest, though it seems to me unsuccessful, effort to show that the doctrine of the court was in accordance with the common law. The reasoning of the learned judge is very thoroughly refuted in the very able note of Mr. Rand, the editor of the last edition of the Massachusetts reports. It is not my purpose to attempt a review of this opinion, exhausting, as it does, the argument on that side of the question.

Upon a careful examination of the opinion, it will be found that not a single case was cited in which it was ever held in England, or out of Massachusetts, that replevin laid where there had been no actual taking of the goods by the defendant; no case in which it is held that replevin lay for a chattel delivered by the plaintiff to defendant, and afterwards unlawfully detained. Every case cited is one of a chattel taken against the will of the possessor, either in distress or otherwise.

The learned judge endeavors to maintain himself, by citing cases arising under the law of distress, in which it has been held that replevin will lie when the distrainer, by abuse of his authority, becomes a trespasser *ab initio*, as a refusal to give up cattle distrained damage-feasant after tender of sufficient amends. This, before the decision in the six carpenters' case, was held to make a trespass *ab initio*, although a mere non-feasance. But, as I have already remarked, replevin was originally a counter-remedy to distress, and was intended to be co-extensive with that remedy.

But the main point made by Justice Putnam is, that there are cases in the law where a withholding has been held a taking. He puts two. One in *Rescous*, where one distrains beasts damage-feasant, and while driving them away to pound, they go into the house of the owner, who withholdeth them, and will not let them be impounded. This withholding is a trespass, citing *Terms of the Law*, title *Rescous*. This seems a quibble upon words rather than a grave argument. Withholding is used in this passage in the sense of taking and keeping possession, which is the act described; it is the act of the rescuer depriving the distrainer of his distress against his will.

The other is the familiar principle, that the allegation of a taking at the place laid in the declaration is proved by the defendants having had the goods there. This is only one application of the rule, that by the first tort in taking possession

no right is acquired, and every subsequent removal is a trespass: *Walton v. Kersop*, 2 Wils. 354; *Abercrombie v. Parkhurst*, 2 Bos. & Pul. 480; *Johnson v. Wollyer*, 1 Stra. 507.

It will be remembered that the point to be made out is, that a mere withholding without a previous taking is a caption, and it is obvious that neither of these cases prove that. The whole argument of the opinion seems to be this, that replevin will lie for a mere detention of chattels, because, in some cases of distress, it will lie, although the distress was originally lawful, but subsequently became unlawful. This has been disposed of. And because, in some cases, a detention has been held to be equivalent to a caption. This has been shown to be inaccurate.

The cases cited by Justice Putnam, although not establishing what he desires, do show that replevin is a proper remedy in all cases of distress, where the right to the distress did not exist or is gone, and in all cases of taking when trespass will lie, although the taking is only tortious by relation, and not originally.

The cases in Pennsylvania are not decided upon such grounds as to make them authority on this point in this state. Morris, in his work on replevin, says it seems not to have been thought necessary in Pennsylvania to inquire exactly into the extent of the English law on the subject, the judges saying that, however it might be in England, it was well settled that in Pennsylvania the action lay in all cases where one man claimed property in the possession of another: Morris on Replevin, 38; *Weaver v. Lawrence*, 1 Dall. 157, and other cases cited by him.

It may be proper to remark that by some it has been regarded as an argument worthy of notice in favor of the maintenance of the action for a mere detention, that where no other plea than *non cepit* is pleaded, and the plaintiff fails to prove a caption, he is nonsuit, and there is no judgment of *retorno habendo*. The cases say there can be no return adjudged, unless some plea be pleaded praying a return. In such a case, the chattel, which on the service of the writ had been delivered to the plaintiff, would remain with him. He would thus, although failing in his action and being condemned in the costs, in some cases recover the chattel, although there had been no unlawful taking.

It will be perceived at once that instead of proving that the action will lie for an unlawful detention only, it proves the

reverse, for the plaintiff is nonsuit with costs. The failure of the defendant to regain his property in such a case results from his neglect to plead a plea of property, putting the plaintiff's allegation of property in himself in issue, with a prayer for a return of the goods. The case would then stand thus: A verdict for the defendant that he did not take the property, which would absolve him from the costs, and a confession by default of the plaintiff's property.

If the plea of *non cepit* is pleaded, and also a plea of property in the defendant *absque hoc*, etc., and at the trial the plaintiff fails to prove the tortious taking, the defendant would be entitled to a verdict on that plea, and also upon the plea of property; for if the defendant did not take the property from the plaintiff, the plaintiff would not be in a position in that action to question the defendant's right. If the plaintiff was nonsuit for failure to make out the trespass, the ground of his action, a return would be adjudged on the prayer of his second plea.

In Bacon's Abridgment, title Replevin, I, it is said, in replevin of goods taken at D, the defendant pleads in abatement that they were taken at another place *absque hoc*; that they were taken at D, and *pro retorno habendo*; avows for rent on a lease for years, etc.; the plaintiff replies and traverses the lease, etc.; this is ill; for though the defendant, when he pleads in abatement, must avow also to have a return, yet the plaintiff cannot answer it, but must take issue on the other matter, for the avowry in such a case is only in the nature of a suggestion to have a return of the goods: *Potter v. North*, 1 Saund. 347; *Anonymous*, 1 Vent. 127; *Foot's Case*, 1 Salk. 93; *Bullythorpe v. Turner*, Willes, 475.

If the plaintiff in replevin is nonsuit before declaration filed, the return of the goods is adjudged; if after declaration filed, no judgment of *retorno habendo* is rendered, unless a plea admitting such a judgment has been filed as an avowry, or a plea in bar showing property out of the plaintiff: Gilbert on Replevin, 169, 170.

The rule seems to be that where *non cepit* and another plea entitling to a return are pleaded, if *non cepit* is not found for the plaintiff, or the plaintiff is nonsuit for failure to prove a caption, there will be judgment of *retorno habendo*.

The plaintiff's property in the goods being denied upon the record, or not being admitted, and a taking being essential to the maintenance of the action, any finding on the other issue is immaterial. It is the case of two facts necessary to be

proved to maintain an action. If there is a failure to prove either, it is equivalent in effect to a failure to prove both. The plaintiff is not bound to prove a caption, unless it is denied by *non cepit*; nor his property, unless by plea of property in another, or in defendant and another, or in defendant. Pleading one without the other admits that which is not denied.

We frequently find in the books mention of replevin in the *detinet*, said to be now obsolete. This, by some, has been regarded a separate form of action for the recovery of goods only detained, not taken. This is a misapprehension. There was but one form of action.

In *Fletcher v. Wilkins*, 6 East, 283, Lord Ellenborough, C. J., said: "The industry of the gentlemen who very ably argued the case has not succeeded in discovering a mode of proceeding by action of replevin to recover damages, as contradistinguished from proceedings to have the goods again. There does not appear in any of the books any proceeding in replevin which has not been commenced by writ requiring the sheriff to cause the goods of the plaintiff to be replevied to him, or by plaint in the sheriff's court, the process in which is a precept to replevy the goods." What was called replevin in the *detinet* was only a mode of declaring.

If on the issuing and service of the ordinary writ of replevin the goods were not returned to the plaintiff, the declaration was *quare cepit et adhuc detinet contra vad et pleg*.

If the goods were returned, the declaration was *quare cepit et ea detinet contra vad et pleg quousque*: *Patter v. North*, 1 Saund. 347; Rast. Ent. 560; Co. Ent. 610 b; Com. Dig., pl. 3, r. 10.

If the declaration was in the *detinet*, the plaintiff recovered the value of the goods, damages for the taking, and costs, but never the goods themselves: Com. Dig., pl. 3, r. 10; Fitzh. N. B. 69.

What has been called the modern action was said to be in the *detinuit*, because the declaration charged the defendant with taking and detaining until suit brought; *detinuit quousque* was the language.

The obsolete mode of proceeding was said to be in the *detinet*, because the declaration charged that the defendant *adhuc detinet* after the charge of taking.

As the declaration in both charges a caption, and both are commenced by the same writ, it is evident that neither could be maintained without proof of a previous caption.

The case of *Haythorn v. Rushforth*, 19 N. J. L. 160 [38 Am. Dec. 540], has been cited as an authoritative decision of this court that a taking is not necessary to maintain the action. It cannot be so regarded. Both the judges who delivered opinions in that case repudiated that idea. Both put their opinions upon the ground that the circumstances of the case showed a tortious taking; that trespass would have lain. Mr. Justice Whitehead expressly said the question was, Did the conduct of defendant the time the demand was made amount to a tortious taking thereof, or was it such an interference with the property as would entitle the plaintiff to maintain an action of trespass against him. He expressly said it was not necessary to express an opinion upon the point whether replevin would lie for an unlawful detention. Justice Elmer also cited the opinion of Chief Justice Ewing, in *Bruen v. Ogden*, 11 N. J. L. 370 [20 Am. Dec. 593], as the law that replevin cannot be maintained without proof of an unlawful taking; that a wrongful detention was not sufficient; and then proceeds to discuss whether the plaintiff might have maintained trespass on the facts proved, and came to the conclusion that he could. I have never been able to see how that case could be sustained upon the principles adopted by the court.

Buckley and Haythorn were the original owners of the machinery; the plaintiff sold his right to Buckley, who put the machinery into a mill he rented of defendant; with it he manufactured goods out of stock furnished by defendants, at a certain price per yard. The defendants stopped furnishing stock, and they and Buckley made another arrangement, by which the defendants were to work the machinery then in their mill part of the time in payment of the rent, and Buckley to do any work that he could get. Buckley had the key of the building, and retained the control of the machinery. He made a bill of sale of it to the plaintiff, and went to the mill with him and demanded it of the defendant, who refused to let it go until they got other in its place.

As the case appears in the report, the defendants had a right to use the machinery, and were at the time of the demand in actual possession of it solely or jointly with Buckley. How the refusal to give up that possession, which they had acquired by agreement with Buckley could make them trespassers, it is hard to perceive. The property came to their possession by delivery from Buckley, or was theirs by con-

tract. The demand and refusal could not make them trespassers; it was an admission that they were in possession. It was to terminate that possession.

It has always seemed that that case could not be maintained except upon the principle of an unlawful detention. It has therefore been considered as an authority for the doctrine that replevin would lie upon that alone. If the defendants had no lawful possession at the time of the demand, and then took possession, it was rightly decided upon the principles assumed. That case is no authority for a doctrine which the court repudiated in deciding it, although the decision may not be supported except by assuming the doctrine to be the law.

Although this remedy may be prompt, efficacious, and beneficial, and in many cases the only one giving the necessary relief to a party having a right to the possession of chattels, I do not feel at liberty, entertaining as I do a clear conviction that a tortious taking is necessary by the common law as the ground of the action to indulge in judicial legislation for the purpose of enlarging the scope of the action.

If we sustain this verdict, we must do it without a shadow of pretense of an unlawful taking; for here the property came into the hands of the defendant under a lease, and was at the time of the demand so held, although the lease was forfeited by non-payment of the rent.

The verdict should be set aside, and a new trial granted.

OGDEN and BROWN, JJ., concurred.

VREDENBURGH, J., dissented.

ACTION OF REPLEVIN, AS DETERMINED IN PRINCIPAL CASE, was originally based upon a wrongful taking of the property. It is at the present time, however, an appropriate remedy, for every wrongful detention of property to which the plaintiff has a present right of possession, whether it was ever in his possession or not: *Dearmon v. Blackburn*, 60 Am. Dec. 160, and cases there cited; and note to *Hickey v. Hinsdale*, 77 Id. 453.

MORRIS AND ESSEX RAILROAD CO. v. AYRES.

[5 DUTCHER, 393.]

DUTY OF COMMON CARRIERS BY RAILWAY is to transport goods to the place of destination and deposit them, without delay or additional charge, in their warehouse until the owner or assignee has a reasonable time to remove them. They need not deliver the goods at the place of business of the owner or assignee, nor give notice of their arrival.

COMMON CARRIER BY RAILWAY BECOMES WAREHOUSEMAN, and responsible only as such when he has transported the goods to their place of destination and safely stored them and has them ready for delivery.

OWNER OF GOODS TRANSPORTED BY RAILROAD must remove them within a reasonable time after they have reached their place of destination.

WHETHER REGULATIONS MADE BY RAILROAD COMPANY ARE REASONABLE is a question of fact to be determined by the jury, though their determination, when against the evidence, may be set aside by the court and a new trial granted.

REGULATION BY RAILROAD COMPANY IS REASONABLE AND VALID when it provides that a receipt shall be given for all the goods before any part are removed.

RAILROAD COMPANY IS NOT BOUND TO MAKE MORE THAN ONE DELIVERY of any shipment of goods transported by it. The owner has no right to require the company to deliver portions of the goods at different times; but may be required to receive and receipt for the whole at once, having first been afforded an opportunity of seeing the goods and determining whether they were all there and in good condition.

THIS case was certified to this court for its advisory opinion. The facts appear from such opinion.

By Court, HAINES, J. The plaintiffs, being merchants at Morristown, had certain articles of merchandise transported for them by the defendants from the city of New York to their place of business. The goods, consisting of about three loads for a one-horse wagon, were safely brought to Morristown, and stored in the warehouse of the defendants, ready to be delivered to the plaintiffs on their signing a receipt for the whole quantity and paying the freight.

The freight was duly paid, but the plaintiffs refused to sign a receipt for all the goods, and proposed to remove them by a wagon-load at a time, and to give receipts for such as they might take at each load. The regulations of the company required a receipt for all the goods before any part were removed, and without such receipt their agent refused to deliver any part of them.

Thereupon the plaintiffs brought their writ of replevin, by virtue of which the sheriff delivered to them the whole quantity. The object of the action is to test the validity of the regulation.

A verdict was rendered for the plaintiffs; and several exceptions having been taken by the defendants during the trial, the judge directed the same to be certified to this court for its advisory opinion on the several points stated in the case.

The obligation of common carriers by railway is safely to transport the goods to the place of destination, to deposit them

without delay and without additional charge, in their warehouse until the owner or consignee has a reasonable time to remove them. They are not required, as carriers by wagons, to deliver at the door or place of business of the owner or consignee, nor as carriers by water, to give notice of their arrival. Their route, being confined to the track of their road, renders the first impracticable without the use of wagons, which is not part of their contract, and the usual certainty of the arrival of the train renders the latter unnecessary, and by the usage of the business was not required.

Having the merchandise in good order, and safely stored and protected from the weather and from trespassers, and ready for delivery, allowing a reasonable time for the owner or consignee to remove them, their duty as carriers ceases, and they are no longer liable as carriers. After that they become warehousemen, with the liability only of bailees without hire, and responsible only for ordinary neglect: *Redfield on Railways*, 252, 253; 1 *Parsons on Contracts*, 663, 671; *Pierce on Railways*, 436; *Powell v. Myers*, 26 Wend. 591; *Goold v. Chapin*, 10 Barb. 612; *Thomas v. Boston and Prov. R. R. Corp.*, 10 Met. 472 [43 Am. Dec. 441]; *Norway Plains Co. v. Boston and Maine R. R. Co.*, 1 Gray, 263 [61 Am. Dec. 423].

After so depositing them in their warehouse, they keep the goods for the exclusive benefit of the owner, whose duty it is to remove them in a reasonable time: *Garside v. Trent and Mersey Navigation Co.*, 4 T. R. 581; *Brown v. Denison*, 2 Wend. 593; *Ackley v. Kellogg*, 8 Cow. 223.

In the case before us, the defendants had performed all their duty as to transportation and storage, and had the goods ready for delivery, subject only to the signing of a receipt for all, in accordance with the regulation.

The question then arose whether that regulation was reasonable, and that was a question of fact to be determined by the jury. The validity of a by-law which binds the members of the corporation only, and not third persons, is purely a question of law. But the reasonableness of the regulation as is deemed necessary and conducive to the comfort, convenience, or safety of passengers, or to protect the rights of the company, is purely a question of fact. The reasonableness or unreasonableness of such regulation is properly for the consideration, not of the court, but of the jury: *State v. Overton*, 24 N. J. L. 435, 441 [61 Am. Dec. 671].

The court, therefore, did not err in refusing to nonsuit the

plaintiffs, and in submitting the question of fact to the jury. Thus the first point certified is answered in the negative, to wit, that the motion to nonsuit ought not to have been granted.

The verdict having been against the defendants, and consequently against the reasonableness of the regulation, a further question is presented, whether the verdict was or was not against the weight of evidence on that subject.

By the testimony in the case, it appears that the company had experienced great inconvenience and great difficulty arising from the delivery of so large an amount of freight to so many persons without retaining some written evidence of the delivery; and they could not tell in any particular case whether particular goods were delivered, or not; and that there was a further difficulty arising from persons leaving goods at the depot for a length of time, and taking them away in parcels, and frequent complaints had been made of goods being there after the company thought they had reason to believe that all were delivered and taken away. The regulation was then adopted to induce persons to remove their goods as speedily as they could, and also to give to the company evidence that the goods had been safely brought to the place of delivery, and to have one receipt for all, instead of a receipt for such portion as the owner might see proper to take away from time to time. An opportunity was offered to the owner to examine the goods to see if they were all there and in good order before a receipt was required.

This rule, which had been applied to one of the principal stations of the company, was found to operate well, so that in five years there was not an instance of any one receipting for goods and afterwards claiming that any had been lost or not delivered.

When it was applied to the whole line of the road, it was again found to operate well, and was acquiesced in by freighters generally, some few only complaining that it was oppressive and unjust.

In my judgment, there was abundant evidence from which the jury might and should have found the regulation to be reasonable.

The company had a right, as carriers, to be discharged of their liability on their being ready to deliver the goods, and to have some written evidence of such discharge. It is not reasonable to require them to employ a witness to the delivery of every parcel, when and as often as the owner may choose to

call for it, nor to be compelled to have as many receipts as the owner may find it convenient to take parcels of his goods.

The company were bound to be ready to make delivery of the goods; but it is one delivery, and not many, that the law requires. They have the right, also, to be discharged from liability as warehousemen. The owner having had an opportunity of inspecting the goods, to see that all were there and in good condition, he was bound to take the custody of them, and to assume the responsibility of their safe-keeping, and to remove them out of the way of the company with all reasonable diligence.

To the giving of a single receipt for all the goods at the station, it is no answer to say that the company gave receipts for them in parcels. The cartmen who deliver the goods to the freight agent take receipts for each load, and they can ask for no more. The company are not bound to give receipts for goods before they are delivered at their station, and are seen by the agent there, and each load may and usually does constitute one delivery, and for it is given one receipt. On the same principle, the owner at the place of destination has one delivery of all the goods there, and it is reasonable that he should surrender the company's receipts which they have given, or that he give one general voucher for what is delivered to him and placed in his custody. Should any error appear, either in the quantity of goods delivered or in the condition of them, the receipt is not conclusive; it is but parol and *prima facie* evidence of delivery in good order and in full quantity, and like a bill of lading or any other receipt, is subject to explanation and correction.

I am of opinion that the verdict was against the weight of evidence, and that the circuit court should be advised to set it aside and to grant a new trial.

This, of course, answers the fourth and fifth points certified, and supersedes the necessity of considering the second and third points.

REGULATIONS WHICH COMMON CARRIER MAY LAWFULLY IMPOSE are very fully considered in the note to *Commonwealth v. Power*, 41 Am. Dec. 471-487. Whether a regulation is reasonable or not is a mixed question of law and fact, and must be submitted to the jury for their determination: *State v. Overton*, 61 Id. 671, and note; *Day v. Owen*, 72 Id. 62; *Compton v. Van Volkenburgh & N. J. R. R.*, 34 N. J. L. 134. Carrier's liability after goods reach their destination and are stored in a warehouse is that of warehouseman only: *Porter v. C. & R. I. R. R. Co.*, 71 Id. 286, and note.

CASES AT LAW
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

DERRICKSON v. EDWARDS

[5 DUTCHER, 468.]

MECHANIC'S LIEN.—**CONTRACT TO FURNISH MATERIALS AND PERFORM WORK** in the construction of a building is an entirety, and no part of the work is regarded as being done, or material as being furnished, until the whole contract is complete.

MECHANIC'S LIEN.—**PURCHASER OF PROPERTY AFTER WORK HAS BEGUN** on a building is properly named as an owner in a claim for a lien subsequently filed, and is a proper and necessary party in a proceeding to foreclose such lien.

WORD "FLUME" MEANS passage or channel for the water that turns a mill-wheel.

COSTS OF FLUME ARE PROPERLY INCLUDED IN MECHANIC'S LIEN, where such flume is used for the purpose of conveying water to a wheel within the mill-building, and is necessary as a fixed contrivance for the operation of such mill.

CLAIMING IN MECHANIC'S LIEN MORE LAND than is necessary for the convenient and beneficial enjoyment of the building upon which the work was done or material furnished, does not vitiate the whole claim. The amount of land necessary in such case is a question of fact to be settled in some manner at the trial. Although a lien cannot be extended beyond the land described in the lien claim, it does not follow that the claimant must show himself entitled to a lien on all the land so described, or else lose his entire claim.

THE facts are stated in the opinion.

Cutler and Randolph, for the plaintiffs in error.

Williamson and Dayton, for the defendants in error.

By Court, OGDEN, J. The proceedings were instituted by Edwards and Clark, in Morris county, to enforce a lien claim upon a paper-mill and the curtilage whereon it is erected.

The materials were furnished and the work was done by the plaintiffs below, under a special contract, made with Derrickson, as builder, who at the time was also the owner of the premises.

Some months after the work was completed, and was partly paid for, but before the lien claim was filed in the clerk's office, Derrickson sold and conveyed the property to Seymour and Sage, who went into possession and held it when the lien was filed and when the suit was commenced. The repairs and additions made by the plaintiffs to the mill were finished by the twenty-fifth of February, 1857, and the claim was filed on the thirty-first of the following December. The summons was issued on the fourteenth of January, 1858.

In the paper filed with the clerk, the plaintiffs below claim a lien upon the building known as the Phoenix mill, together with the lot and curtilage whereon the same stands, which lot is particularly described by courses and distances, and a deduction of title; and they state that the land and estate therein in fee-simple is owned by Melancthon L. Seymour and Warren B. Sage. They further state that the name of the person who contracted the debt, and for whom the materials were furnished, and the work, labor, and services rendered, for which the lien is claimed, is James T. Derrickson.

The bill of particulars attached, which is dated February 25, 1857, is for building water-wheel, flume, and breast shaft, and furnishing materials, done by special contract for four thousand dollars. Credits are given upon it, which reduce the balance claimed to one thousand eight hundred and fourteen dollars and seventy cents.

After the plaintiffs rested their case before the jury, the counsel for the defendants moved the court to dismiss the suit as against all the defendants, and especially as against Seymour and Sage: 1. Because Seymour and Sage were improperly joined in the action; 2. Because it appeared that a part of the labor and materials were done and furnished more than a year before the filing of the lien claim; 3. Because the lien claim is bad, and void on its face, in not stating with sufficient particularity the times and terms of doing the work and furnishing the materials; 4. Because it claims a lien on more land than is subject to any rightful lien of the plaintiff; 5. Because the claim is void in claiming a lien for work and materials on the flume.

This motion was overruled.

The defendants examined several witnesses, and at the close of the testimony it was agreed by the parties that the verdict should be taken for the plaintiff for the amount claimed, with interest from the twenty-fifth of February, 1857; and that all questions of law raised during the trial should be reserved for the opinion of the supreme court at bar, and that the verdict should be subject to the opinion of that court on the points reserved.

The matters were argued at the supreme court upon the case stated for their opinion, and they certified to the circuit court that they found no error in the proceedings or verdict upon the questions reserved for their advisory opinion, and that the several questions so reserved should be decided in favor of the plaintiffs.

Final judgment was rendered in the circuit court in favor of the plaintiffs, which has been removed into this court by writ of error.

It appears, in the case, that the work was commenced about the sixth of October, 1856, and as the claim was not filed until the thirty-first of December, 1857, the defendants have insisted that the price of the materials furnished and work done more than a year before the claim was filed did not become a lien on the premises.

Two satisfactory answers are given to this objection.

First, that the contract is an entirety, and that in the contemplation of the statute the work and materials cannot be considered as furnished until the whole contract was completed. Neither the language of the act, nor any intention which can be collected from it, requires a mechanic working under a contract to file lien claims from week to week as his work progresses.

The other answer is, that the two credits, amounting to two thousand three hundred dollars, which are given on the lien claim filed under date of October 31, 1856, without specific appropriation by the payor, are more than sufficient to pay for all the work and materials which were shown to have been furnished before the thirty-first of December, 1856.

The next ground of error relied on is, that the lien claim was improperly filed against Seymour and Sage as owners, because they did not purchase the property until several months after the work was completed.

The sixth section of the statute requires that the lien claim filed should contain, among other things, "the name of the

owner or owners of the land, or of the estate therein, on which the lien is claimed," and also the name of the person who contracted the debt, who shall be deemed the builder.

The claim in this case names Mr. Derrickson as the person who contracted the debt, and Messrs. Seymour and Sage as the owners in fee of the land on which the lien is claimed.

The lien claim was correctly made out, unless the act required that the person who was owner when the work was done should be styled owner at the time of filing the claim, instead of the person or persons who became purchasers intermediate between the commencement of the work and the filing of the claim.

It would seem to be consistent with principle that the party holding the title at the time the lien is attempted to be enforced should have notice of the incumbrance by being made a party to the legal proceeding. The form of the summons is given in the eighth section of the statute, which makes the builder and owner, and no other persons, parties defendant to the suit; therefore Seymour and Sage are improperly named in the claim as owners; they were improperly notified by the process issued and served on them to defend and protect their property from the incumbrance put on it before their purchase.

Such construction should not be put upon the sixth section, unless the other parts of the act show clearly that the legislature so intended. If the objection has been well taken, the lien claim is destroyed, because the mechanic cannot hereafter correct the mistake by filing a new claim. The settlement of it is therefore of the first importance to the defendants in error.

By a proviso to the twelfth section, the lien may be extended for a second year by a written agreement for the purpose, signed by the land-owner and claimant and annexed to the claim on file, before the first year has expired. Could the legislature mean to give a person having no interest in the land a right to incumber it for a year without the assent of his vendee? Again, the claimant is required, upon receiving written notice to that effect from the owner of the land or buildings, to commence a suit on the claim within thirty days or lose his claim. Did the legislature intend that the debtor, who neglects to pay his debt to the mechanic, should have the privilege of hastening legal proceedings against property after he had sold it, perhaps, to the great prejudice of his vendee's rights?

Suppose that the builder, after selling his estate to a *bona fide* purchaser, should refuse to expedite the proceedings by giving the notice thus provided for, is the cloud upon his title to be continued for a year, when he is desirous of having a speedy adjudication upon the amount claimed, and upon the question whether the property is liable for the debt?

The fifteenth section provides that any land-owner desiring to contest a claim, and to free his house and land from the lien thereof, may pay the amount to the county clerk, which money is to be held by him until the claim is established by suit. Does this refer exclusively to the owner at the time the work was done, or to a subsequent owner also?

I think there is no doubt but that the lien claim was properly made out in this case, and that Seymour and Sage are proper and necessary parties to the trial.

It was also assigned for error that the court below decided that the cost of the flume was properly included in the amount for which the lien claim was filed. If the claim is good for this item of the account, it must be on the ground that it is a fixture necessary for carrying on the manufacturing purposes for which the mill was repaired and is designed. It will not be necessary for the settlement of the point before us that the court shall say that every structure which may properly be called a flume will be within the intent of the lien law. The meaning of the word is, "The passage or channel for the water that drives a mill-wheel."

All that the court need say at present is, whether the structure which was made by the plaintiffs below, and called a flume in their lien claim, shall be "considered a building," within the fifth section of the mechanic's lien law. It appears in the case that the flume claimed for was built of wood, six feet wide, four feet high, and from sixty to one hundred feet long, running either from the pond or a race-way into the mill for several feet, and is used for the purpose of conveying the water upon the wheel, which also is within the mill-building. The work is as necessary and as fixed a contrivance for making paper at that establishment as the water-wheel and breast shaft and grinding engines are.

The plaintiffs purposely extended their lien claim to that part of their work done under the contract, and there was no error on that point in the ruling of the court below, or in the advisory opinion.

In the fifth assignment of errors, it is said that the lien

claim should have been held to be void, because it embraces more land as a curtilage than was subject to any rightful lien of the plaintiffs. The court refused to dismiss the writ on that ground, and we are to settle whether such refusal was error.

Assuming that the claim in this case is entirely too broad—a fact which we cannot pass upon on a writ of error—and that the dwelling-houses, with the separate lots fenced in with them, should not have been covered by the claim, and that perhaps not half of the land which is embraced should be claimed as the curtilage, is the claim for that cause totally invalid and void?

A curtilage is a piece of ground within the common inclosure belonging to a dwelling-house, and enjoyed with it, for its more convenient occupation. But it does not hence follow, if the land-owner, on whose estate there is a lien claim, has only an outside fence around a farm of one hundred acres, that the whole ground inclosed is *ex vi termini* a curtilage within the intent of the statute.

Undoubtedly, the lot or curtilage claimed to be bound in this case by the lien should have been limited to so much land as is necessary for the convenient and beneficial enjoyment of the mill on which the work was done.

Seeing that the idea of a curtilage may be expanded or contracted by the character and location of the erection standing upon it, and by the nature and extent of the business to be done there, it is highly probable that mechanics and materialmen may honestly differ about the amount of land which can fairly be held by the lien.

It may become a question of fact, to be settled in some manner at the trial; and although the lien cannot lawfully be extended beyond the lands described in the lien claim, yet it does not follow that the claimant must necessarily enforce his lien on all the property he describes as a curtilage or else lose the entire lien claim.

There is nothing in the act which requires the court to say that an error in judgment on the part of the claimant, as to the extent of the curtilage which he lawfully can hold, shall destroy his lien upon the building and on so much land as may be a proper curtilage in the particular case.

I do not find any error in the proceedings in the Morris circuit court, or in the advisory opinion which was certified to them by the supreme court.

The judgment below should be affirmed.

For affirmance: OGDEN, HAINES, CLAWSON, COMBS, CORNELI-
SON, KENNEDY, SWAIN, and WOOD, JJ.

For reversal: BROWN, J.

THE PRINCIPAL CASE IS CITED in *Robins v. Bunn*, 34 N. J. L. 323, and *Jacobus v. M. B. L. I. Co.*, 27 N. J. Eq. 627, to show that the owner of the property, at the time the lien claim is filed, is the proper person to be made defendant in a suit to foreclose such lien.

BROWN v. WHITE.

[5 DUTCHER, 514.]

COVENANT NOT TO SUE ONE OF SEVERAL JOINT DEBTORS does not discharge the debt as to the others.

PAYMENT BY ONE OF SEVERAL DEFENDANTS OF JUDGMENT, and the taking of an assignment to such defendants or to a third person, does not operate as a satisfaction of the judgment in favor of the defendants not making such payment, unless it appears that the payment, when made, was intended to operate as a complete satisfaction of the judgment.

MOTION to enter satisfaction of the judgment. Plaintiff Brown obtained judgment against J. M. White, W. P. Robeson, and others, for sixty thousand dollars. Afterwards, J. M. White paid plaintiff six thousand dollars in pursuance of a memorandum stating that on such payment the judgment should either be released or assigned to such person as W. P. Robeson might choose; if assigned, to be for the benefit of those who had theretofore paid their just proportions of a certain mortgage. The defendant, White, moved to have satisfaction of the judgment entered of record, which motion was granted by the superior court, whereupon a writ of error was prosecuted to this court.

Gilchrist and Zabriskie, for the plaintiff in error.

Browning, for the defendant.

By Court, ELMER, J. The question in this case is, whether the transactions fully detailed in the opinion delivered in the supreme court, which it is not necessary to repeat, amounted to a payment and satisfaction of the debt. It has long been an established doctrine of the common law, that if two or more persons be jointly or jointly and severally bound by one obligation or judgment, and the creditor releases to one of them, all are discharged. This is so, because the law makes

a release under seal conclusive evidence that the debt was intended to be satisfied.

But it was held by the supreme court of this state, in the case of *Crane v. Alling*, 15 N. J. L. 423, in accordance with the prior authorities, that a covenant not to sue one of two joint debtors, and that if he did sue, then the covenant should be a good bar to the action, did not operate to discharge the debt as to the other. This shows that the remedy to recover a debt may be in effect extinguished as to one joint debtor, and yet remain in full force as to the other. Before a debt is held to be satisfied, it must appear that something was done which the parties in fact intended should satisfy it, or which the law considers to be evidence of such intention.

It has always been held that actual payment of a debt by one joint debtor inures for the benefit of all, and that accord and satisfaction by one will inure to the benefit of the other. But this is so when there is a payment or an accord and satisfaction the parties intended should so operate. No case has been produced, nor are we aware of one, where it has been held that the mere payment of money by a debtor to a creditor operated to discharge a debt, when it appeared that it was not intended to have that effect. In the case of *McIntyre v. Miller*, 13 Mee. & W. 728, it was held that one of several partners owing a debt may buy it up, have it assigned to a friend, and collect it in his name. In the language of Baron Parke: "If the debt be kept alive at the time, it cannot be satisfied by the very act which keeps it alive. To construe that as a payment which is meant to be an assignment is a contradiction in terms."

Upon looking at the agreement and receipts signed by Mr. Vroom as agent for the plaintiff, it is clear that Mr. Robeson did not intend that the debt should be paid and satisfied by the money he advanced, so far as Mr. White was concerned; but that he meant that the judgment should be kept alive as against him, and for that purpose it was assigned to a person he designated. The debt was not in fact paid and satisfied, nor was any instrument executed which the law considers conclusive evidence that it was. What was done was to obtain from the creditor, in consideration of a sum of money advanced, an agreement that some of the debtors should not be proceeded against nor their property bound. There was nothing illegal in this, nor was there anything unjust or unfair in regard to Mr. White. He contributed no part

of the money. The transaction was certainly no more a satisfaction of the debt than what was done in the case of *Crane v. Alling*, 15 N. J. L. 423. We are not now called on to determine what the equities between Mr. White and Mr. Robeson are, but simply whether what has been done amounted to a legal satisfaction of the judgment. Being clearly of opinion that it did not, I think the order of the supreme court was erroneous, and must be reversed.

For affirmance: None.

For reversal: GREEN, chancellor, and BROWN, ELMER, HAINES, VAN DYKE, COMBS, CORNELISON, and WOOD, JJ.

THAT PAYMENT OF JUDGMENT BY ONE OF SEVERAL DEFENDANTS NEED NOT OPERATE AS SATISFACTION THEREOF when not so intended, and when an assignment is taken to a third person, seems to be a reasonable and just rule of law, and is affirmed by many authorities in addition to the principal case: *Sherwood v. Collier*, 24 Am. Dec. 264, and note; *Coffee v. Texas*, 17 Cal. 239; *Wheeler's Estate*, 1 Md. Ch. 80; *McIntyre v. Miller*, 13 Me. & W. 723. It is nevertheless questioned and denied in other cases: *Harbeck v. Vanderbilt*, 20 N. Y. 395; *Hammatt v. Wyman*, 9 Mass. 138.

CASES
IN THE
COURT OF CHANCERY
OF
NEW JERSEY.

BEECKMAN v. MONTGOMERY.

[1 McCARTER, 103.]

EXAMINATION OF DEFENDANT IN EXECUTION is not admissible in evidence against one claiming under him by a prior grant.

ADMISSION OR DECLARATION OF GRANTOR MADE AFTER CONVEYANCE is not admissible against his grantee.

VOLUNTARY CONVEYANCE MADE IN CONTEMPLATION OF FUTURE INDEBTEDNESS by one who is not then indebted, is nevertheless fraudulent and void as against subsequent creditors whose debts are contracted immediately or so soon as to warrant a presumption that the debt was made in contemplation of such indebtedness.

CREDITOR'S bill. The facts are stated in the opinion.

Gledhill, for the complainants.

Tuttle, for the respondent.

By Court, **GREEN**, Chancellor. The bill is filed by judgment creditors of Andrew Montgomery, late of Paterson, deceased, for relief against a conveyance of certain real estate, made by the debtor in his life-time to his son Ebenezer Montgomery, the defendant.

The material facts of the case as charged by the bill, and admitted by the answer, or clearly established in evidence, are, that in the year 1853, Andrew Montgomery, having closed up the business in which he had previously been engaged, and disposed of his goods and chattels, was possessed of a small amount of personal estate, amounting to less than one thousand dollars, and was seised and possessed of unincumbered real estate, consisting of a lot on Mulberry street, in the city

of Paterson, of the value of one thousand five hundred dollars, and of a lot on Parke street of the value of four thousand dollars, the fair annual value of the two lots being about four hundred dollars.

On the twenty-second of August, 1853, the said Andrew, then having it in contemplation to engage in mercantile business in the state of Ohio, and having leased a store for that purpose, leased to his daughter Jane Wright, a widow then living in the city of Paterson, for the purpose of securing her a home until her children should be grown up, the Mulberry-street property, for the term of twenty-one years, at an annual rent of ten dollars. On the same day (August 22, 1853), he conveyed to his son, the defendant, then being a minor of about the age of sixteen years, the Parke-street property, for the consideration, as expressed in said deed, of five hundred dollars, but for which no consideration whatever was paid to the grantor. The deed was acknowledged on the twenty-third of August, 1853, but was not recorded until the twenty-fourth of October, 1854.

Soon after the execution of the said deed and lease, Andrew Montgomery removed from this state, and engaged in mercantile business at New Lebanon, in the state of Ohio, his son Ebenezer being with him, and acting as salesman. While so engaged in business, on the thirtieth of September, 1853, he purchased of the complainants a bill of goods, amounting to eight hundred and thirty-four dollars and nine cents, for which debt, with interest, the complainants recovered a judgment against him, in the Passaic circuit, on the fourth of December, 1854, the suit having been commenced on the twenty-third of October, 1854.

About six months after his removal to Ohio, the said Andrew abandoned the business established by him there, and sold out his stock in trade to two of his sons, the greater part of it to the defendant, and took from him in payment the promissory notes of the defendant, then being a minor of about seventeen years of age.

On the twenty-second of November, 1854, the said Andrew Montgomery confessed a judgment in the supreme court of this state to his son George W. Montgomery, for eight hundred and forty-one dollars and eighty-three cents, upon which a writ of execution was issued, and by virtue thereof the remaining interest of the said Andrew in the lot leased to his daughter was levied upon and sold.

The bill charges that the deed so made to the defendant was voluntary; that it was made at a time when the said Andrew had determined to engage in mercantile business, and when he knew that he would be compelled to make large purchases of goods on credit for lack of capital, and that the conveyance was made in contemplation of such indebtedness. The bill prays that the defendant may be decreed to pay the judgment of the complainants, or that it may be declared a lien upon the real estate so conveyed to him as aforesaid.

The only material averments made by the defendant in his answer are, that at the time of the conveyance to him by his father, the said Andrew was free from debt; that the deed was made in good faith in performance of a promise long previously made, and not in contemplation of any indebtedness to be incurred upon his engaging in business; and that his withdrawal from business, and consequent failure to pay the complainants' debt, was occasioned by illness, which resulted in his death in the month of September, 1855. The defendant came of age since the commencement of this suit. There is no controversy as to the material facts of the case. They are all admitted, or clearly established by the evidence. The examination of Andrew Montgomery, taken in a cause wherein he was defendant at the suit of these complainants, by virtue of an order of a justice of the supreme court, under the act to prevent fraudulent trusts and assignments (Nix. Dig. 251), is not *per se* competent evidence. It is not competent as the testimony of a deceased witness in a former action, for the cause is not between the same parties; nor as the admission of a privy in blood, or in estate. The defendant does not claim title to the land in question by descent from his father, but by alienation. The statements were made after the conveyance was made, and the estate vested in the defendant. Such declarations can effect the alienee only where they were made while the estate continued in the party making them. No admission or declaration, made by a grantor after the conveyance of the estate, is evidence against his grantee: Greenl. Ev., sec. 189.

The examination is, however, rendered competent by the subsequent examination of Ebenezer Montgomery, who was present at and heard read the examination of his father, and assented to the truth of its statements. The facts stated, therefore, by the father, so far as they are within the knowledge of the defendant, are admitted by him to be true.

It appears by the evidence, that at the date of the deed the

grantor was unembarrassed by debt. He was seised of real estate of the value of five thousand five hundred dollars, and possessed of personal property of the value of less than one thousand dollars. He leased a house and lot, valued at one thousand five hundred dollars, to his daughter for twenty-one years, at the nominal yearly rent of ten dollars a year. He conveyed the Parke-street property, worth four thousand dollars, to his son, the defendant, in fee, for the consideration of five hundred dollars, paid, not to himself, but to another of his children. At the date of the deed, he had rented a store, and made arrangements for engaging in mercantile business. Immediately after the date of the deed, he embarked a capital of two thousand dollars in business, at least one half of which was raised upon credit. The debt due to the complainants was incurred in little more than a month after the date of the deed. The deed must have been made in contemplation of future indebtedness, for at the time of executing it, arrangements had been made for engaging in business requiring over two thousand dollars, while the defendant had less than one thousand dollars to embark in the business, and no source from which the money could be raised, except upon loan, or by way of credit. This is the case made by the bill, viz., that the deed to the defendant from his father was voluntary, and made in contemplation of future indebtedness.

It is not necessary that a man should be actually indebted at the time he makes a voluntary conveyance, to make it fraudulent. If he does it with a view to his being indebted at a future time, it is equally fraudulent: *Stileman v. Ashdown*, 2 Atk. 481; *Shep. Touch.* 66; 1 Story's Eq. Jur., secs. 361, 362; *Sexton v. Wheaton*, 8 Wheat. 229; *Reade v. Livingston*, 3 Johns. Ch. 500 [8 Am. Dec. 520]; and see 1 Am. Lead. Cas. 36; note to *Sexton v. Wheaton*, *supra*; Roberts on Fraudulent Conveyances, 25.

In *Ridgeway v. Underwood*, 4 Wash. C. C. 137, Mr. Justice Washington thus states the result of the cases upon this subject: "A voluntary deed by a person indebted at the time, to any amount, is fraudulent and void as to such prior creditors merely upon the ground that he was so indebted. But as to subsequent creditors, the deed is not void for that reason, because it does not necessarily, nor even rationally, follow that the conveyance was fraudulently made with intent to hinder or delay creditors, who became such long after the deed was made. But if the case presents other circumstances from

which fraud can legally be inferred, the voluntary conveyance will be avoided in favor of a subsequent creditor. Thus if the grantor in a voluntary deed incurs debts immediately, or so soon afterwards as to warrant a presumption that the deed was made in contemplation of such future indebtedness, it would be difficult to protect such a deed against the charge of fraud."

Where at the time of the conveyance the grantor is free from debt, and there are no circumstances showing that the deed was made with a view to future indebtedness, the deed can be avoided by subsequent creditors only upon proof of actual fraud: *Reade v. Livingston*, 3 Johns. Ch. 502 [8 Am. Dec. 520]; *Bank of United States v. Housman*, 6 Paige, 526; *Ridgeway v. Underwood*, 4 Wash. C. C. 137.

Aside from the fact that the deed to the defendant was made by the father in contemplation of future indebtedness, there are strong circumstances indicating the existence of actual fraud. The deed was made on the eve of the grantor engaging in mercantile business, which would require for its successful pursuit both capital and credit. He disposed, at the time of the conveyance, of the entire control of his real estate, which constituted the bulk of his property, leaving himself an inadequate capital for conducting his business or raising loans. The credit which he obtained was due to his former standing as a man of responsibility. The conveyances to his children were not advancements adapted to the means and situation in life of the grantor—they absorbed his whole property. The deed to the defendant was made while he was an infant but sixteen years of age, not needing an advancement, and not of discretion to take charge and management of the property. It was kept secret for more than a year, and was not left at the office to be recorded till the day after a suit at law was commenced by the complainants for the recovery of their debt. Within six months after engaging in business, the entire stock in trade of the father was divided between two of his sons. The larger part of it, amounting to over eight hundred dollars, was taken by the defendant, and the price paid by the defendant's own notes while he was under age. These circumstances are strong badges of fraud, and in the absence of decisive proof that the deed was made in contemplation of indebtedness to be incurred, would be proof of actual fraud sufficient to avoid the conveyance. It is not necessary, however, to place the complainants' title to relief upon this ground.

The evidence is clear that the conveyance to the defendant was made in contemplation of future indebtedness, and is therefore constructively fraudulent as against the claim of the complainants. They are entitled to relief according to the prayer of their bill.

I find no satisfactory proof that any consideration whatever was paid for the deed by the defendant. He had, it is evident, nothing to pay with. The deed, I incline to think, is purely voluntary, without any consideration whatever, or at least a merely nominal one. I should therefore have no hesitation in setting the deed aside. The complainants' bill, however, asks not to avoid the deed, but to subject the property in the hands of the defendant to the debt of the complainants. This course is in accordance with the practice of the court: *Boyd v. Dunlap*, 1 Johns. Ch. 478; *Wickes v. Clarke*, 8 Paige, 161; 1 Am. Lead. Cas. 49; *Sexton v. Wheaton*, 8 Wheat. 229.

The debt will be declared a charge upon the land at the date of the conveyance, and if necessary, a sale will be ordered to satisfy the incumbrance.

The conveyance of the property, alleged to have been made by the defendant since the filing of the bill, cannot affect the complainants' rights. Notice of the pending of the suit was duly filed in the clerk's office of the county, pursuant to the requirements of the statute.

THAT VOLUNTARY CONVEYANCE MADE IN CONTEMPLATION OF INDEBTEDNESS then intended to be contracted is fraudulent and void as against the holder of such indebtedness is a rule of law, to sustain which the principal case was cited in *Cramer v. Reford*, 17 N. J. Eq. 383; *National Bank v. Sprague*, 20 Id. 25; *Annin v. Annin*, 24 Id. 194; *City National Bank v. Hamilton*, 34 Id. 161. It is also cited in the case last named to show that "no admission or declaration made by a grantor after the conveyance of the estate is evidence against his grantee."

CASES
IN THE
SUPREME COURT OF APPEALS
OF
NEW YORK.

COFFIN v. COFFIN.

[28 NEW YORK, 2.]

FACT THAT DRAUGHTSMAN OF WILL TAKES LEGACY UNDER It is at most only a suspicious circumstance which may be of more or less or no weight, according to its connection with other circumstances indicative of fraud or undue influence.

SECRECY IN EXECUTION OF HIS WILL, CONTRIVED BY TESTATOR HIMSELF, is not to be regarded as in any wise impeaching its validity.

PREFERENCE OF COLLATERAL RELATIVES OVER WIFE, IN WILL, does not necessarily show undue influence or fraud, nor does it, in the absence of further proof, impeach the validity of the will.

PUBLICATION OF WILL MAY BE MADE IN ANY FORM of communication by testator to witnesses, whereby he makes known to them that he intends the instrument to take effect as his will.

TESTATOR'S REQUEST TO WITNESSES TO SUBSCRIBE ATTESTATION may be made through any words or acts which clearly evince that desire to them, and the publication may be incorporated with the request.

WHERE ONE OF TWO WITNESSES TO WILL, in the presence and hearing of the other, asked the testator, "Do you request me to sign this paper as your will, as a witness?" and the testator answered, "Yes," this was sufficient as a request to both the witnesses, and as a publication of the will.

APPEAL from a judgment of the supreme court affirming a judgment of the surrogate court refusing to admit to probate the last will of Trustrum Coffin, deceased. The will was propounded in the surrogate court by the executors, and probate was opposed by the widow and son, on the grounds: 1. That the will was not executed according to the requirements of the statute; 2. That it was obtained by fraud and undue influ-

ence; 3. That the testator was incompetent to make a will. The remaining facts appear in the opinion.

H. A. Nelson, for the appellants.

A. J. Parker, for the respondents.

By Court, COMSTOCK, C. J. The objection that the testator was incompetent to make a will, being wholly unsustained by the proof, was abandoned on the argument in this court. It was urged, however, that the execution of the instrument was procured by fraud and undue influence, and this point will be first examined. It appears that the testator, although an aged man, and doubtless somewhat enfeebled in his faculties, lived nearly three years after the will was made, and attended to such affairs as he had to transact. At the date of the will he was in the enjoyment of his usual health. The transaction was kept a secret from his wife, and from the domestics belonging to his household. They were absent from his house on the day of the execution, but their absence and the secrecy of the act appear to have been contrived by himself, without a suggestion from any other quarter. He sent for his nephew, Alexander H. Coffin, who resided some three miles distant, and with whom it seems he had a previous understanding in regard to drawing the will, when the circumstances were considered favorable to such a purpose. Alexander H. Coffin had prepared himself with a book of forms, and when sent for he went to the testator's house, drew the will, and attended to the formalities of execution. The attesting witnesses were two persons engaged in doing some mechanical work for the testator, and whose presence on that day, so far as we know, was procured by himself. In all these circumstances, we see no evidence of coercion or fraud, or even of persuasion, which influenced the mind or conduct of the testator. On the contrary, they show very clearly that his acts were prompted by motives entirely his own. Secrecy and contrivance may undoubtedly be badges of fraud in the execution as well of wills as of other instruments; but when the circumstances of that character can be clearly traced to the mind or wishes of the testator himself, they cannot be received as having any tendency to impeach his testamentary dispositions.

We have been referred to the will itself as directing an unusual, if not an unnatural, distribution of the estate of the decedent, and as evincing the presence of some undue and fraudulent influence upon his mind. His property was worth

about fifty-five thousand five hundred dollars. It consisted of the farm on which he lived, valued at twenty-eight thousand dollars; of personal estate upon it, worth three thousand five hundred dollars; and of bonds, mortgages, and other assets, estimated at twenty-four thousand dollars. His collateral kindred were a sister, Mrs. Rider, and ten nephews and nieces, the children of his brother. By his will he gave to his wife, absolutely, the sum of six thousand dollars, and one half his furniture, in lieu of dower. To his son he devised the farm. He gave him also the personal estate situated thereon, the other half of the furniture, and seven thousand dollars in money. The value of this devise and of these bequests to the son was thirty-eight thousand five hundred dollars. The estate given to him was, however, to remain under the control of the executors until he should become of age; and in case he should die before that time, or without issue, it was subject to a limitation over in favor of his sister and his nephews and nieces. To his sister, the testator bequeathed the sum of three thousand dollars; and the residue of his estate he gave to his nephews and nieces, the children of his brother, according to certain proportions specified. The amount of the residuum would be about eight thousand dollars. A. H. Coffin, who drew the will and was appointed one of the three executors, was one of the nephews, and the legacy given to him was four hundred dollars—the like sum being also given to several of his brothers and sisters.

In this plan of distribution and limitation, we see nothing so eccentric or extraordinary as to justify an inference that it was not in harmony with the testator's own well-considered wishes and intentions. His wife was so much younger than himself that he must have married her at an advanced period of his life, and she probably had not participated in the toils and cares which led to the accumulation of his estate. We are not informed of the particulars of their domestic life; but that confidence and affection on his part were attended with some reserve is evident from the circumstance that he did not wish her to be acquainted with the execution or contents of his will. He gave to her, absolutely, a sum, the income of which would be quite sufficient for her support. Having done this, we can imagine the existence of motives, not at all unreasonable, which induced him to prefer his own kindred to her or her kindred in the further dispositions of his estate. He recognized the claims of a sister in the legacy which he

gave to her, and also of his brother's children to a very moderate extent, after making the most ample provision for his son. The contingent limitation of the son's share in favor of his sister and nephews and nieces simply exhibits a preference which we cannot pronounce an unnatural one. And inasmuch as we find nothing in the will which cannot be accounted for according to sentiments and affections known to exist in common life, and which often influence men in their testamentary acts, so we have no right to infer, without other proof, that, in making such a will, the testator's own mind was not fully and freely expressed.

The circumstance that the nephew who prepared the will was appointed one of the executors, and is also a legatee, has been urged upon our consideration. Facts of this kind may, and do often, very justly excite the suspicion of courts, when fraud and undue influence are alleged. But it is not a rule or principle in the law of testaments that the draughtsman of a will cannot be an executor, or cannot take a benefit under it. As men quite generally appoint some of their kindred to be their executors, the choice in the instance before us does not seem to be an unnatural one. Indeed, there would be some difficulty in suggesting a different choice in the actual circumstances and relations of the testator. His son was an infant, and his wife does not appear to have been the object of his testamentary regard, except in the pecuniary provision which has been mentioned. To give her, moreover, the control of the son's estate during his minority would not be quite consistent with the motives which dictated the ulterior limitation in favor of his own kindred. In respect to the legacy or portion given to A. H. Coffin, the draughtsman of this will, we find it so moderate in amount, and in such just proportion to the sums given to the nine other persons standing in the same relation to the testator, as to afford no ground for invalidating the instrument, or any part of it. As I have observed, there is no rule of law which prevents a person who prepares a will from taking a legacy under it. In the language of Baron Parke, in *Butlin v. Barry*, 1 Curt. Ecc. 637, "all that can be truly said is, that if a person, whether an attorney or not, prepare a will with a legacy to himself, it is at most a suspicious circumstance of more or less weight, according to the facts of each particular case; in some, of no weight at all, as in the case suggested, varying according to circumstances; for instance, the *quantum* of the legacy, the proportion it bears to the property disposed of, and numerous other contingencies."

Having come, therefore, to the conclusion that the will cannot be impeached on the ground of fraud in procuring its execution, the next inquiry is, whether it was published and attested with the requisite legal formalities. The evidence on this point is that of the two attesting witnesses, and of the draughtsman, Mr. Coffin. According to the testimony of the latter, there can be no doubt. He has sworn to all the particulars of execution, publication, and attestation which the statute requires. His statement, however, differs considerably from that of the two attesting witnesses; and the surrogate, in deciding against the will, seems to have discredited his account of the transaction in the circumstances where it differed from theirs. We have not the advantage of seeing and hearing the witnesses. As the case appears to us, without their actual presence, we should certainly incline to think the evidence of Mr. Coffin to be altogether the most reliable. That he had much greater intelligence in regard to a subject of this nature cannot be doubted. Indeed, we have every reason to conclude that he had, before preparing this will, made himself fully acquainted with the formalities which the law required. From his situation and relation to the transaction, his attention must have been given to all the particulars; and his evidence is direct and positive. On the other hand, the subscribing witnesses were called to the presence of the testator for the purpose of attestation only; and their failure to state all the facts to which the other witness deposed may not unreasonably be referred to their want of attention or of memory. They were called to testify some three years after the fact; and it is not at all singular that they should have lost the recollection of some of the circumstances. Such would be our impressions, if the hearing were now an original one; but we prefer to place the decision we make more distinctly on the ground that the will is valid according to the evidence of the attesting witnesses alone.

First, as to the publication. The statute requires that the testator, when he subscribes a will, or acknowledges its execution to the witnesses, shall declare the instrument to be his last will and testament: 2 R. S. 63. But this declaration need not be in any particular form. Any communication of the testator to the witnesses, whereby he makes known to them that he intends the instrument to take effect as his will, will satisfy the requirement: *Lewis v. Lewis*, 11 N. Y. 226; *Brinkerhoof v. Remsen*, 8 Paige, 488; S. C., 26 Wend. 825. In the case

before us, according to the evidence of the two attesting witnesses, one of them asked the testator if he wished him to sign or witness the paper as his will; to which the testator answered in the affirmative. As both the witnesses were present, this was a good publication as to both of them, if good as to either. We think it was sufficient, because it was in substance a communication that the paper was the will of the testator. There can be no doubt that such a declaration can be made in answer to a question, or even by a sign. It is only required that it be understandingly made, and this we have no reason to question in the present case. All the circumstances surrounding and attending the transaction demonstrate that the testator perfectly understood the nature of the act he was performing.

In the next place, as to the attestation. The statute requires two witnesses, each of whom must sign his name at the end of the will, at the request of the testator. Confining ourselves to the evidence of these two witnesses, the facts appear to be these: They were present at the testator's house on the day in question by his own procurement, and for the purpose, as there is reason to believe, of witnessing his will. When the instrument was ready for execution and attestation, they were summoned to the room where the matter was transacted. They came there, saw the testator subscribe his name, and signed their names as witnesses. Before doing so, one of them asked the testator if he requested him to sign the will as a witness; to which he answered in the affirmative. Both the witnesses then proceeded to sign, the draughtsman denoting the place where their names were to be written. The testator, the draughtsman, and the witnesses were all at one table, and in close proximity to each other. The request to attest the will was in answer to the question thus put by one of the witnesses, and no other or different communication was made to the other. Taking this as substantially the true statement of the facts, the objection which has been urged is, that one of the witnesses attested the instrument without any request made by the testator. Now, the statute, it is true, declares that each witness must sign on such request. But the manner and form in which the request must be made, and the evidence by which it must be proved, are not prescribed. We apprehend it is clear that no precise form of words, addressed to each of the witnesses at the very time of the attestation, is required. Any communication importing such request, addressed to one of the witnesses in the presence

of the other, and which, by a just construction of all the circumstances, is intended for both, is, we think, sufficient. In this case, both the witnesses, by the direction or with the knowledge of the testator, were summoned to attend him for the purpose of witnessing his will. They came into his presence accordingly, and in answer to the inquiry of one of them, in which the singular instead of a plural pronoun was used, he desired the attestation to be made. In thus requiring both the witnesses to be present, and in thus answering the interrogatory addressed to him by one of them, we think that he did, in effect, request them both to become the subscribing witnesses to the instrument. Any other interpretation of his language, and of the attending circumstances, would be altogether too narrow and precise.

Another point urged upon the argument deserves a brief consideration. The statute, in separate and independent clauses, besides the subscription of the testator, requires that he shall declare the instrument to be his will, and shall request the witnesses to sign it. In this case, the publication, and the request that the witnesses should sign it as such, are both included in the testator's answer, when asked whether he wished to have the paper attested as his will. But this objection, we think, is not fatal. All that the statute requires is, that the act of publication, and the act of requesting the witnesses to sign, shall both be performed. These acts are distinct in their nature or quality, but their performance may be joint or connected. If a testator should say to the witnesses, "I desire you to attest this instrument as my last will and testament," the language would import, not only a request, but a clear publication of the will. This point has been so held by Mr. Bradford, the late learned surrogate of New York, and for reasons entirely satisfactory: *Rieben v. Hicks*, 3 Bradf. 853.

On the whole, we are of opinion that the judgment of the supreme court and the sentence of the surrogate must both be reversed, without costs of the litigation to either party, and the proceedings remitted to the surrogate. with a direction to admit the will to probate.

Lott, J., took no part in the decision; all the other judges concurred.

Ordered accordingly.

AM. DEC. VOL. LXXX—16

FACT THAT DRAUGHTSMAN OF WILL TAKES LEGACY UNDER It is not clear evidence of fraud or undue influence, and is at most only a suspicious circumstance of more or less weight, and sometimes of no weight at all: *Limburger v. Rauch*, 2 Abb. Pr., N. S., 284; *Booth v. Kitchen*, 3 Redf. 65, both citing the principal case.

EXECUTION, PUBLICATION, AND ATTESTATION OF WILLS, sufficiency of, generally: See *Chaffee v. Baptist M. Conf.*, 40 Am. Dec. 225, and note; *Reed v. Roberts*, 71 Id. 210, and note 216; *Montgomery v. Perkins*, 74 Id. 419; *Webb v. Fleming*, 76 Id. 675, and note 677. Witnesses must always subscribe and attest will at request of testator, evidenced by some means or other: *Bundy v. Knight*, 48 Ind. 506; *Estate of Harder*, Tuck. 429. Where the testator himself requests the witnesses to sign, there is no doubt that this is a sufficient request, under the statute, to witnesses, and acknowledgment and publication of the will: *Peck v. Cary*, 38 Barb. 79; *Baskin v. Baskin*, 36 N. Y. 419; *Estate of Harder*, Tuck. 429. Strict or literal compliance with the statute in this regard is not required: *Montgomery v. Perkins*, 74 Am. Dec. 419; *Gamble v. Gamble*, 39 Barb. 381; *In re Simpson*, 56 How. Pr. 143; and the intention of the testator in the matter will be looked to: *Trustees v. Calhoun*, 25 N. Y. 424. All that the statute requires is that the act of publication and act of requesting witnesses to sign shall both be performed, and their performance may be joint and connected: *Belding v. Leichardt*, 2 Thomp. & C. 54. No specific request by the testator to the witnesses to sign is necessary, and if they sign in his presence, and without objection on his part, he knowing the fact that they are signing as witnesses, it is sufficient: *Will of John Meurer*, 44 Wis. 399; and where, on witness being called to sign, testator is asked if the paper is his will, he may answer by a sign, if understandingly made: *Trustees v. Calhoun*, 62 Barb. 391. A request by another than the testator, but in the latter's presence, that witnesses sign, and acknowledgment of his signature by testator, he making no objection when they sign, is held sufficient: *Gilbert v. Knox*, 52 N. Y. 129; *Smith v. Truslow*, 84 Id. 665. Where one of the witnesses, in the presence and hearing of the other, whose attendance had been procured by the testator, and in the presence and hearing of the testator, asked the latter, "Do you require me to sign this will as your witness," to which the testator said, "Yes," this was held sufficient as a request to both of the witnesses, and a publication of the will: *Trustees v. Calhoun*, 38 Barb. 151; *In re Mary Smith*, 40 How. Pr. 125; *Darling v. Arthur*, 22 Hun, 85; *Bagley v. Blackman*, 2 Lans. 43; *Peck v. Cary*, 27 N. Y. 34; *Thompson v. Stevens*, 62 Id. 635; *Mairs v. Freeman*, 3 Redf. 195; *Von Hoffman v. Ward*, 4 Id. 260. All of the above cases, except those from this series, cite the principal case to the points mentioned.

AFTER HEARING ON APPEAL FROM SURROGATE ON CONTEST OF VALIDITY OF WILL, if, from a review of the whole case, it is apparently improbable that the contestants could establish the invalidity of the will, the appellate court will reverse the decree below, and direct that the will stand as a valid instrument, and be admitted to probate: *Pilling v. Pilling*, 45 Barb. 94; *Baskin v. Baskin*, 48 Id. 210; *Johnson v. Hicks*, 1 Lans. 157, citing the principal case.

MERRITT v. TODD.

[23 NEW YORK, 22.]

INDORSED PROMISSORY NOTE PAYABLE ON DEMAND, with interest, is a continuing security, on which the indorser will remain liable until an actual demand; and upon which the holder is not chargeable with neglect for omitting to make demand within any particular time.

ACTION on a promissory note of Obadiah Peck, payable on demand, with interest, on the order of Rufus L. Todd, who, knowing the facts, indorsed the note, at the time it was made, for the accommodation of Peck. Peck becoming insolvent, three years and a half after the making of the note, payment of the note was demanded and refused, and notice thereof given to the indorser. The court found on these facts that the demand had not been made within a reasonable time, and the indorser was discharged, and the complaint was therefore dismissed. Plaintiff appealed.

E. W. Chester, for the appellant.

Amasa J. Parker, for the respondent.

By Court, COMSTOCK, C. J. There is a most inconvenient uncertainty as to the rule of law applicable to the question in this case—an uncertainty, not inherent in the subject, but which arises from the want of harmony, and still more, I think, from the want of an intelligible principle in many of the adjudged cases. The difficulty is not inherent, because there are two opposing principles, either of which would furnish a rule sufficiently clear and precise for the determination of this and all similar controversies; but the greater number of decided cases, while following neither one of those theories, do not suggest any other having the elements of certainty which belong to a rule of law.

In the light of one of these principles, the contract is interpreted according to its terms, that is to say, a promissory note, payable on demand, with interest, and indorsed, is regarded as a continuing security; so that, on the one side, the maker is not deemed in default until the money is actually demanded, while on the other, the holder may make the demand when he pleases, and is not chargeable with neglect if he does not make it within any particular time. In this view, which gives the most obvious interpretation to the language of the contract, no dishonor attaches to such a note until payment is required and refused; and the indorser is held, if notice of the refusal

is given to him with due diligence. And this is the doctrine of the English courts. In *Brooks v. Mitchell*, 9 Mee. & W. 15, a note of one thousand pounds, payable on demand, with interest, had been indorsed and transferred several years after its date; and the question was, whether the indorsee took it subject to equities between prior parties. The court observed: "If a promissory note payable on demand is, after a certain time, to be treated as overdue, although payment has not been demanded, it is no longer a negotiable instrument. But a promissory note payable on demand is intended to be a continuing security. It is quite unlike the case of a check, which is intended to be presented speedily." Such was also the doctrine laid down in *Barough v. White*, 4 Barn. & Cress. 325.

The alternative, or opposing rule, is, that the holder of such a note as we are speaking of must, if he wishes to charge the indorser, make his demand of the maker without delay, or in the language of the law merchant, within a reasonable time. This is a rule sufficiently exact, if we give to the phrase "reasonable time" its proper legal signification. In the sense of the law relating to bills and notes, these words exclude all delays, except such as necessity or convenience requires. They call simply for due diligence in performing the act which is to be done. They have no reference to what may be a convenient time for the maker of the principal obligation to pay his debt; but they refer solely to the time within which the holder can conveniently make the necessary presentment or demand, or give the required notice. What is reasonable time, or due diligence, is settled in most circumstances by legal rules capable of a definite application to questions as they arise. In the formation of these rules, a supposed credit, or indulgence toward the debtor, has never entered as a circumstance or element to be considered. Thus, in the language of the books, notice of the dishonor of a bill or note must be given to the drawer or indorser within a reasonable time. But where the parties reside in the same town or city, this reasonable time is held not to extend beyond the next day after the presentment for acceptance or payment: Story on Promissory Notes, secs. 319, 320. Where they reside in different towns or cities, and the notice is sent by post, it must be mailed early enough for transmission on the day following the dishonor. So in the cases where presentment for acceptance is necessary, as in the instance of a bill payable at so many days after sight, or ac-

according to some authorities payable at sight, the presentment must be made within a reasonable period; it need not be made on the very day when the bill is dated, or when it comes to the hands of the holder; but the bill cannot be held for a single hour as a time instrument or obligation. It must be presented as soon as the circumstances will reasonably permit, reference being had to the distance of the parties from each other, to sickness and other casualties; but no time is allowed for the convenience of the person on whom the bill is drawn. The notion of a credit or indulgence due to him, in respect to the funds in his hands, does not enter at all into the calculation. These are well-settled rules of the commercial law; and if promissory notes, payable on demand, in all cases fall within them, there will very rarely be any difficulty in determining whether such a note has been demanded in due season to charge the indorser. The demand must, according to these rules, be always made within a reasonable time, that is to say, as soon as the holder can make it; allowing, for his convenience, the next day after it comes to his hands, if the parties reside in the same town, or longer, according to their distance from each, and other circumstances which may reasonably prevent the prompt performance of the act.

We have these two principles, directly antagonistic to each other, by one or the other of which questions like the one before us ought to be determined. We say this, because there is no intermediate ground to stand upon. A note payable on demand is either a continuing security, upon which a demand may be made in season at any time, or it is not, and then a demand must be made immediately, that is to say, on the next day after the holder receives the note, or within such additional time only as the circumstances of distance, etc., may require. If we depart from these rules, and attempt to find one lying somewhere between them, we are lost in uncertainty, and the community will never know how to transact business of this nature in safety. If we admit the theory, that by taking a demand note, some term of credit, of longer or shorter duration, is given to the maker, but yet a term not to be ascertained by an actual presentment and demand, then a question forever arises, What is that period of credit? And this is a question absolutely incapable of solution according to any principle intelligible in itself or capable of application to the dealings of men. If we say that such a note is not in dishonor for ten days, where the parties live near to each other, and that it

need not be demanded within that time, what reason can be given for saying that it must be demanded within ten months? It seems to me plain that such obligations are due immediately for the purpose of charging an indorser, or letting in a defense against an indorsee which existed between the original parties, or else that they are not due for those purposes until the money is called for.

Some authority can be cited in favor of both these opposing principles. As I have said, a note payable on demand, with interest, is regarded in England as a continuing security, imposing no duty of presentment within any particular time. In this country, one of the earliest cases on the subject which I have noticed is that of *Field v. Nickerson*, 13 Mass. 131, which sustains the opposite doctrine. In that case, the note was payable on demand, with interest, and indorsed by the defendant for the accommodation of the maker. No demand was made until eight months after the date of the instrument. The question was, whether the indorsee was discharged by that delay. Chief Justice Parker, in giving the opinion of the court, thought that such notes must be demanded within a reasonable time, in the sense of the commercial law, that is, as soon as the act could be conveniently done. He observed, in substance, that such a note, in respect to the duty of presentment, was like a draft payable at sight; and if he was correct in that view of the question, the conclusion was plain, because in regard to sight drafts the rule is well settled. The holder must present them with due diligence, having no reference to the convenience of the drawee.

But a considerable number of later cases might be referred to, resting on less definite grounds, and tending very much to obscure the general question. In *Martin v. Winslow*, 2 Mason, 241, there was a delay of seven months in presenting a note payable on demand, and it was held by Judge Story that the indorser was discharged; but in holding this, the doctrine was not asserted that immediate diligence must be exercised in making the demand, nor was it suggested that, if the delay had been a month or a week shorter, the indorser would not have been held. On the other hand, the supreme court of Massachusetts, in *Seaver v. Lincoln*, 21 Pick. 267, held that a demand made on the seventh day after its date upon a note payable on demand, with interest, was in due season to charge the indorser. The holder resided eighteen miles from the maker and six from the indorser; but there was no suggestion

or pretense that the delay was excused by any circumstances of that character, or that it could be accounted for at all by any convenience or necessity of the holder. Nor does the case assert, on the other hand, that such securities are of a continuing character, according to the doctrine of the English courts. In *Ranger v. Cary*, 1 Met. 369, the note was transferred by the payee one month after it was given, and the court held that it was not to be deemed as due and dishonored so as to be subject to a defense which the maker had against the original holder. In the following year, the contrary proposition was determined by the same court, in reference to a similar note transferred eight months after its date: *American Bank v. Jenness*, 2 Id. 288. No reason was given for either decision, except that in one case the time was only one month, and in the other eight.

The course of decision in our own state is not more satisfactory. The earliest case is that of *Furman v. Haskin*, 2 Cai. 369, where it appeared that eighteen months had elapsed before the transfer of the note, and this lapse of time was held sufficient to admit a defense of the maker. It does not appear that the note was on interest. In *Sice v. Cunningham*, 1 Cow. 397, the question was, whether the indorser was discharged by a delay of five months in demanding payment of the note from the maker. The court held that he was discharged; but whether a delay for any shorter period would have the same effect was not suggested, nor was any rule laid down for the determination of questions of this character. In the latter case of *Wethey v. Andrews*, 3 Hill, 582, the note was payable on demand, with interest, and it was transferred three or four weeks after its date. It was held not dishonored, so as to let in a defense of a want of consideration. In this case, the circumstance that the security was on interest seems to have been treated for the first time as quite material to the question. Judge Cowen observed that "it would be contrary to the general course of business to demand payment short of some proper point for computing interest, such as a quarter, half a year, a year," etc.; and he goes on to cite, with apparent approbation, the doctrine of the English courts, that such securities are of a continuing character, and cannot be considered as dishonored until payment is demanded and refused. In *Vreeland v. Hyde*, 2 Hall, 429, it was decided by the superior court of the city of New York that such a note, I mean one on demand with interest, could be demanded, and the indorser

charged, nineteen months after its date. I do not think that the reasons assigned for that decision were very carefully considered, although the decision itself is in accordance with the conclusion to which I have arrived in the present case.

We are satisfied that questions of this kind ought to be determined according to one of the two rules which have been mentioned; in other words, that the demand may be made in due season at any time so as to charge the indorser, or else that he is discharged, unless it be made with due diligence, in the general sense of the commercial law. Between these alternatives, we are to select the one which will best harmonize with the language of the contract and the intention of the parties. A demand note may be payable with or without interest. If the security be not on interest, it may be a fair exposition of the contract to hold that no time of credit is contemplated by the indorser, and that the demand should be made as quickly as the law will require upon a check or sight draft. Such a note, payable at a bank where the maker keeps his funds, will perform essentially the office of a check, imposing the duty of early presentment in order to hold the collateral parties. Drafts or checks are, however, almost universally used in such transactions. But whatever may be the rule where the security is not on interest, we think that a note payable on demand, with interest, is a continuing security, from which none of the parties are discharged until it is dishonored by an actual presentment and a refusal to pay. The loan or forbearance of money may be for a definite or an indefinite time. If the parties declare in the written instrument, which is the only evidence of their agreement, that the money shall be paid on call, with interest in the mean time, a productive investment of the sum for some period of time is plainly intended. What, then, is that period? The only answer which can be given is, that it is indefinite or indeterminate, and ascertainable only by an actual call for the money; and if that be the meaning of the principal parties, the indorser must be deemed to lend his name to the contract with the same intention. The only rational alternative is, that the payee or holder of such a note must demand its payment on the same day or the day after he receives it, unless some necessity or convenience of his own will excuse a longer delay; and he must give immediate notice of the refusal to the indorser. But a demand thus quickly made would probably, in every case, violate the actual intention of the parties, and it

ought not, therefore, to be required as a rule of law for any collateral purpose. It should not be required in order to charge an indorser, if the act would not be consistent with the fair interpretation of the principal contract. In short, we see no good reason why a note like the one now in question should not be construed precisely according to its terms; and if we follow that construction, such instruments are not dishonored by the mere effluxion of time which is provided for in their own language.

It may be well to observe that the present question is not identical with the one which arises where, after the transfer of such a note, the maker seeks to introduce a defense existing against the first holder. The lapse of time, or the non-payment of interest after the regular period or periods for such payment have passed, may be sufficient to put the purchaser on inquiry, or to justify a presumption that the instrument was actually dishonored before the transfer. It might well be true, in such a case, that a demand had been actually made and notice given to the first indorser so as to charge him, while at the same time the maker would be let in to defend, if he had any defense. Questions of charging the indorser, therefore, and questions of allowing an original defense to the maker, may depend on very different considerations.

On the whole, we are of opinion that, in the case before us, the indorser was duly charged by the actual demand upon the maker of the note and by the notice of his refusal to pay. In arriving at this conclusion, we are aware that we go somewhat beyond many adjudged cases, and that the decision is in conflict with some of them. Yet we go no further than the principle of other cases fairly leads us; and we have the satisfaction of believing that the rule we lay down is not only just in itself and tends to uphold dealings according to their actual intention, but that it will promote certainty in a branch of the law where certainty is eminently desirable.

The judgments of the general and special terms of the supreme courts must be reversed, and a new trial granted, with costs to abide the event.

SELDEN, DENIO, DAVIES, MASON, and JAMES, JJ., concurred.

HOYT, J., filed a dissenting opinion.

LOTT, J., also dissented.

Judgment reversed, and new trial ordered.

PROMISSORY NOTES PAYABLE ON DEMAND.—Notes payable on demand are deemed by the law to admit a present debt to be due to the payee, and payable absolutely and at all events whenever and by whomsoever presented for payment according to their purport. And it is held that no demand is necessary before bringing suit upon such notes: *Taylor v. Witman*, 3 Grant Cas. 138; and no such demand need therefore be alleged in the action, the bringing of the suit itself being said to be a sufficient demand: *Rumball v. Ball*, 10 Mod. 38; *Dougherty v. Western Bank*, 13 Ga. 287; *Burnham v. Allen*, 1 Gray, 496. In *Wheeler v. Warner*, 47 N. Y. 520, the court say, in this regard, that upon such a note "an action may be maintained against the maker without any demand, because it is due. No demand can be sued before due; no action will lie upon any claim of any description arising upon contract before it is due. To say that the suit is the demand is to repeat an unmeaning phrase as thus used, which no number of repetitions can make sensible. A demand note is due forthwith, and hence may be sued on without demand." From this, it follows that the statute of limitations begins to run from the making or date of such notes: *Norton v. Ellam*, 2 Mee. & W. 461; *Preshey v. Williams*, 15 Mass. 193; *Newman v. Kettelle*, 13 Pick. 418; *Larason v. Lambert*, 12 N. J. L. 247; *Wenman v. Mohawk Ins. Co.*, 13 Wend. 267; *Wheeler v. Warner*, 47 N. Y. 519; *Caldwell v. Rodman*, 5 Jones L. 139; *Hill v. Henry*, 17 Ohio, 9; *Taylor v. Witman*, 3 Grant Cas. 138; *Wilks v. Robinson*, 3 Rich. 182. The principal case is recognized as having worked a great change concerning the application of the statute of limitations, in the law of promissory notes payable on demand: *Payne v. State*, 39 Barb. 640; but that change is only applicable to such notes as are payable with interest, as will be seen below, and the law now is as it has always been, as above stated, that the statute of limitations begins to run on notes payable on demand as soon as made: *Sands v. St. John*, 26 Id. 637; S. C., 23 How. Pr. 148; *Eisenlord v. Dillenback*, 15 Hun, 25; *Alexander v. Parsons*, 3 Lans. 334, all citing the principal case.

Where a note does not specify any day or time of payment whatsoever, it is deemed to be such a note payable on demand, as much as if it contained the words "payable on demand" on its face: *Green v. Drebilhis*, 1 G. Greene, 552. Thus in *Collins v. Trotter*, 81 Mo. 275, a promissory note payable simply on the "first day of March" is held to be payable on demand. And a note reading, "On demand, the first of January next, I promise," etc., is payable presently, and suit may be brought thereon immediately without demand, the words "first of January next" being held to apply to the interest made payable in the note: *Brett v. Ming*, 1 Fla. 447; see also *Jillson v. Hill*, 4 Gray, 316.

"In England it has been held, and such is the general current of authorities, that a negotiable note payable on demand does not become overdue by mere lapse of time," but is a continuing security: *Carll v. Brown*, 2 Mich. 402, citing *Barrough v. White*, 4 Barn. & Cress. 335; *Brooks v. Mitchell*, 9 Mee. & W. 14.

But in this country the rule is modified, and the general doctrine seems to be that a promissory note, payable on demand, will be considered overdue and dishonored unless payment is in some manner demanded within a reasonable time: *Carll v. Brown*, 2 Mich. 402; *Mudd v. Harper*, 54 Am. Dec. 644; *Nevins v. Town*, 6 Conn. 5; *Thurston v. McKnown*, 6 Mass. 428; *Field v. Nickerson*, 13 Id. 138; *Range v. Cary*, 1 Met. 369; *Furman v. Haskin*, 2 Cai. 368; *Sice v. Cunningham*, 1 Cow. 410; *Sanford v. Mickles*, 4 Johns. 224; *Losee v. Dunkin*, 7 Id. 70; *Lockwood v. Crawford*, 18 Conn. 361.

Promissory notes are not ordinarily payable at sight, although they may be

so. If a note is payable at sight, or at so many days after sight, or after demand, it seems that the same rule prevails which is applied to bills of exchange drawn at or after sight, which is that the sight which the maker has at the time the note is made is not sufficient, but a distinct and subsequent presentment must be made, and the sight is considered had at, and the time reckoned from, such presentment or demand: *Dixon v. Nuttall*, 1 Crompt. M. & R. 307; S. C., 4 Tyrw. 1013; *Sturdy v. Henderson*, 4 Barn. & Ald. 592; *Sutton v. Toomer*, 7 Barn. & Cress. 416; *Holmes v. Kerrison*, 2 Taunt. 323; and the statute of limitations in such cases commences to run only after the sight or demand, or after the prescribed period after demand (as the case may be) has expired: *Wenman v. Mohave Ins. Co.*, 13 Wend. 267; *Taylor v. Wilman*, 3 Grant Cas. 138.

Both as to notes payable on demand or at sight, and as to those payable so many days after demand or sight, the rule is as above stated, that to protect the instruments from defenses which may be made against overdue paper, and to preserve recourse against the indorser, payment must be demanded within a reasonable time, and what that time is must depend upon the circumstances of each case. The holder of such a note is not at liberty to keep it in his possession for an unreasonable time without presentment, and to lock it up from circulation. If he does, he will make the note his own, and will discharge the antecedent indorsers thereon from all responsibility. But if the note is kept in circulation, and not held by any one holder, through whose hands it passes, an unreasonable time, it seems difficult to assign any particular time in which it ought to be presented to the maker, so that the time of payment should begin to run thereon: *Mulman v. D'Eguino*, 2 H. Black. 565; *Mellish v. Rawdon*, 9 Bing. 416; *Goupy v. Harden*, 2 Marsh. 454; S. C., 7 Taunt. 159; *Mullick v. Radakissen*, 9 Moo. P. C. 46; *Fry v. Hill*, 7 Taunt. 397; *Chartered M. Bank v. Dickson*, L. R. 3 P. C. 574; *Lockwood v. Crawford*, 18 Conn. 361; *Goodwin v. Davenport*, 47 Me. 112; *Robinson v. Ames*, 20 Johna. 146; *Gowan v. Jackson*, Id. 176; *Herrick v. Woolverton*, 41 N. Y. 587. This rule may sometimes be limited in its application to particular classes of cases resulting from the common course of business or the circulation of particular classes of notes, such as those of banks, but these classes are all governed by particular usage: See Story on Promissory Notes, 7th ed., sec. 208, pp. 284, 285, notes.

What is a reasonable time, as already stated, is a question to be determined in each case. And there seems to be no particular uniformity in the decisions. A delay of eighteen months before making demand was held unreasonable: *Furman v. Haskin*, 2 Cai. 368; likewise where the delay was only for a period of two and one half months: *Stevens v. Bruce*, 21 Pick. 139; but the same period was held not to be unreasonable in *Lozee v. Dunkin*, 7 Johna. 70; and in *Sanford v. Mickles*, 4 Id. 224, five months was held not unreasonable; and likewise as to periods of thirty days: *Range v. Cary*, 1 Met. 369; and twenty-four days: *Carll v. Brown*, 2 Mich. 401; but in *Keys v. Fenstermacher*, 24 Cal. 331, two weeks was held to discharge the indorser. As to what delay will discharge the indorser, see further the cases cited below.

When demand notes have been given for loans, i. e., accommodation notes, it would seem natural that they are intended as continuing securities, and immediate presentment not necessary to charge the indorser: *Vreeland v. Hyde*, 2 Hall, 429; 1 Daniel on Negotiable Instruments, sec. 607, though the contrary has been held; *Perry v. Green*, 4 Harr. 61. Where a demand was not made for twenty-one months, it was considered sufficient in such a case: *Vreeland v. Hyde*, 2 Hall, 429. But in *Sice v. Cunningham*, 1 Cow. 597, a

delay of five months, all the parties residing in the same place, was held to discharge the indorser; and so seven months' delay was held fatal: *Martin v. Winslow*, 2 Mason, 241, although the maker had told the accommodation indorser that the note would not be demanded immediately: *Field v. Nickerson*, 13 Mass. 131.

Notes Payable on Demand, with Interest.—Concerning notes payable on demand with interest, there is quite a conflict of the authorities, and particularly as to the authority of the principal case, and as to what is decided therein. The principal case will be considered separately below.

In *Brooks v. Mitchell*, 9 Mee. & W. 15, the doctrine generally established by the English cases was followed, and it was held that notes on demand, whether with or without interest, are taken as continuing securities, the court saying: "If a promissory note payable on demand is, after a certain time, to be treated as overdue, although payment has not been demanded, it is no longer a negotiable instrument. But a promissory note, payable on demand, is intended to be a continuing security. It is quite unlike the case of a check, which is intended to be presented speedily." The circumstance that the note bore interest did not control or affect the decision of the court: See, to the same effect, *Borough v. White*, 4 Barn. & Cress. 225; *Gascoyne v. Smith*, 1 Myl. & K. 338.

In the United States it is held that the general rule, that demand notes must be presented within a reasonable time, will apply as well to demand notes which do bear interest as to those which do not.

The matter of interest was held to be a motor in considering what is a reasonable time, so as to preserve notes from defenses which could be made against overdue paper. Thus in New York, where such a note was transferred three or four weeks after date, it was said that "it would be contrary to the general course of business to demand payment, short of some proper point for computing interest, such as a quarter, half a year, a year," etc., and it was held that the note was not overdue so as to admit a plea of want of consideration: *Wetley v. Andrews*, 3 Hill, 582. But in *Herrick v. Woolverton*, 41 N. Y. 581, where the note, payable on demand, with interest, was transferred nearly three months after date, the parties having their places of business in the same street in the same city, it was held overdue, so as to admit equities; and in another case, a similar note transferred two and a half months after date was held open to the defense of part payment before transfer: *Loess v. Durkin*, 7 Johns. 70; and in *Rhodes v. Seymour*, 36 Conn. 6, a note was held overdue, at the time of indorsement, ten months after date.

And the same diversity exists in the decisions concerning reasonable time for demand on such notes in order to charge the indorser: See on this head the discussion of the principal case, *post*. In *Theilman v. Gueble*, 32 La. Ann. 260, S. C., 36 Am. Rep. 267, where the principal case is disapproved, it is held that a demand note, though bearing interest, must be protested and notice given within a reasonable time, in order to hold the indorser; and a demand after the lapse of four years was held too late, notwithstanding the note was indorsed for accommodation. In *Sice v. Cunningham*, 1 Cow. 397, five and one half months' delay was held to discharge the indorser; so, in *Martin v. Winslow*, 2 Mason, 241, where the delay was for a period of seven months; and likewise where the delay was for eight months: *Field v. Nickerson*, 13 Mass. 131; but on the other hand, in the principal case where the delay was for a period of three years, the indorser was still held liable; so in *Vreeland v. Hyde*, 2 Hall, 429, the indorser was held not discharged when

the note was presented twenty-one months after date; but in Massachusetts no consideration seems to have been paid to the fact that the note bore interest, the court merely considering what would be a reasonable time. Seven days' delay seems to have been considered quite a delay, though held not too long: *Seaver v. Lincoln*, 21 Pick. 267.

Daniel says that "where these questions remain undetermined, the authorities are so much at war that it would be difficult to predict what rule would commend itself to the court. It seems to us that where the note was indorsed at the time of making, and whether it bore interest or not, it should be regarded as a continuing security, and would not be overdue in the hands of the payee, either so as to open equities or to discharge the indorser, until payment was demanded and refused. But when transferred by indorsement, it would become by the very act of indorsement a draft by the indorser upon the maker; and the indorsee holding it should regard it, as it is in fact, a demand through him for the amount due the indorser; and it should therefore be presented immediately:" 1 Daniel on Negotiable Instruments, 3d ed., sec. 610.

Miscellaneous.—In *McMullen v. Rafferty*, 24 Hun, 364, the court say that the statute of limitations runs from the making and delivery of a note payable on demand with interest, where the note is non-negotiable, distinguishing the principal case.

Where a note was made payable "on demand after date" at a bank, with interest "after maturity," and was indorsed and transferred by the payee on the day of its date, it was held that it must be presented for payment, as the parties evidently so intended, and a delay of over forty months was held to discharge the indorser: *Crim v. Starkweather*, 88 N. Y. 339, citing the principal case.

Notice of dishonor of an indorsed note payable on demand, where necessary, must be given in the same manner as of bills and notes payable at a fixed day: *Lockwood v. Crawford*, 18 Conn. 361.

The Principal Case.—In *Scovil v. Scovil*, 45 Barb. 523, S. C. 30 How. Pr. 264, *Payne v. Gardiner*, 29 N. Y. 172, *Continental Bank v. Bramball*, 10 Bosw. 507, and *Pardee v. Fish*, 67 Barb. 408, it is held that a note on demand with interest is not due until demand, and is a continuing security; and these rulings are strictly on the authority of the principal case. In the case of *Payne v. Gardiner*, *supra*, the counsel raised the point that the rule that the note would be considered a continuing security would apply only as between indorsers and holders, and not to the maker. The court said that the rule laid down in the principal case, that a demand note with interest is a continuing security, applied as well to a maker as to an indorser, and that the principal case so decided. It said, further, that the principal case worked a great change in the law of promissory notes payable on demand with interest, and also that it left the law in inconvenient uncertainty: *Herrick v. Woolberton*, 42 Barb. 52. While this is true, the change effected is misapprehended, and is not as above stated. In *Herrick v. Woolberton*, 41 N. Y. 587, the court, in reference to the conflict of opinion as to what was decided in the principal case, says: "It is doubtless true that this court held, in that case (*Merritt v. Todd*, 23 N. Y. 28), that a promissory note, payable on demand, with interest, is a continuing security; that the indorser remains liable until an actual demand of payment; and that the holder, as between him and the indorser, is not chargeable with neglect for omitting to make such demand within any particular time; and whether the reasoning upon which the decision was based be correct or not, such is the decision of this court. It, however, only de-

sides what the law is between holder and indorser; and the chief judge, in his opinion, discriminates between that case and such as the one before us, and says: 'It may be well to observe that the present question is not identical with the one which arises when, after the transfer of such a note, the maker seeks to introduce a defense existing against the first holder. The lapse of time, or the non-payment of interest after the regular period or periods for such payment have passed, may be sufficient to put the purchaser on inquiry or to justify a presumption that the instrument was actually dishonored before the transfer. It might well be true, in such a case, that a demand had been actually made and notice given to the first indorser, so as to charge him, while at the same time the maker would be let in to defend, if he had any defense. Questions of charging the indorser, therefore, and questions of allowing an original defense to the maker, may depend on very different considerations:'" See also *Mills v. Hicks*, 12 Jones & S. 530.

And in *Wheeler v. Warner*, 47 N. Y. 520, also considering the principal case, the court say: "The decision in *Merritt v. Todd*, 23 N. Y. 28, seems to have caused some disturbance in the law as to the right of parties upon demand notes. That case simply decided that an indorser on such a note bearing interest was not discharged, though no demand was made upon the maker until some three and a half years after the making of the note. That as between holder and indorser, such a note was not due until demand made. This rule, by the decision itself, was confined to that particular case, and did not apply, nor was it claimed to apply, to the rights of holders of such paper as against the maker. We are not disposed to extend the rule there laid down. There is no divided opinion here or in England that upon such a note, with or without interest, an action may be maintained against the maker without any demand because it is due. No demand can be sued before due; no action will be upon any claim of any description arising upon contract before it is due. To say that the suit is the demand is to repeat an unmeaning phrase as thus used, which no number of repetitions can make sensible. A demand note is due forthwith, and hence may be sued without demand, nor until this decision of *Merritt v. Todd* has there been any difference of opinion as to the time when such a note is barred by the statute. But that decision does not settle this question. There is really no reason why the statute should not run, and that it does run, both here and in England, is settled beyond all doubt. If *Merritt v. Todd*, in its reasoning, can be regarded as impugning this doctrine, it has been distinctly decided again in this court since that decision in *Howland v. Edmonds*, 24 N. Y. 307."

In *Hirst v. Brooks*, 50 Barb. 337, the court, construing the principal case, say that the most sensible construction of the case is that a note payable on demand with interest may be protested at any time within the statutory period (in New York, six months) after its date, so as to charge the indorser if the maker neglects to pay it on demand, but it would be unreasonable to construe the holding in that case to be that the indorser could be made liable to pay such note by protesting it more than six years after date, when an action against the maker would be barred by the statute of limitations.

In *Pardee v. Fish*, 60 N. Y. 271, it is said that if the instrument in question can be regarded as a negotiable promissory note, the indorser remains liable until demand, and the holder is not chargeable with negligence for omitting to make such demand within any particular time.

Statutes.—In many states, on account of the contrariety of the views of courts, statutes have been passed fixing the time of maturity of notes payable on demand, and this obviates the necessity in many states of judicial investigation of the subject.

CHAMBERLAIN v. PEOPLE.

[23 NEW YORK, 85.]

WITNESS IS GUILTY OF PERJURY WHO TESTIFIES FALSELY TO MATERIAL FACT, although he was not competent as a witness in the case, or to prove the particular fact concerning which he testified. So held, in an action for divorce, on the ground of adultery, where the husband, his wife having borne a child, testified falsely that he had had no sexual intercourse with her during their marriage.

IN ACTION BETWEEN HUSBAND AND WIFE, EITHER PARTY IS COMPETENT WITNESS against the other, in general, under the New York law of 1857, though inadmissible to prove the particular fact of non-intercourse.

ON INDICTMENT OF HUSBAND FOR PERJURY, AFTER DIVORCE, WIFE IS COMPETENT WITNESS to prove that she has had no sexual intercourse with any other person.

INDICTMENT for perjury, charging that the accused, in an action against his wife for divorce, had falsely sworn, as a witness in his own behalf, that he had never, since his marriage, had sexual intercourse with her. It was proved on the trial that the wife was delivered of a child about a year after the marriage, and before the divorce. The record in the divorce suit was introduced, and it was shown thereby that the husband had been granted a divorce on the ground of adultery of the wife. The prosecution on the trial called the wife, and against the objection of the defendant, was permitted to ask her whether she had ever had sexual intercourse with any other person than her husband, to which question she answered in the negative. The remaining facts appear in the opinion. The defendant was convicted, and he appealed.

John L. Talcott, for the plaintiff in error.

Freeman J. Fithian, for the defendants in error.

By Court, **JAMES, J.** The bill of exceptions in this case presents but two questions for review. The first is the prisoner's objection to proving what he testified to on the hearing before the referee in the divorce suit; and the second, his objection to a question put to his wife, a witness after divorce, on behalf of the people. Both were overruled.

The first exception was placed upon two grounds: 1. That the prisoner was not a competent witness in the action, and anything he might swear to therein was not material or admissible, and that perjury could not be assigned thereon; 2. That the testimony was immaterial.

The statutes declare that "every person who shall willfully and corruptly swear, testify, or affirm falsely to any material

matter, upon any oath, affirmation, or declaration, legally administered in any matter, cause, or proceeding, depending in any court of law or equity, or before any officer thereof, shall, upon conviction, be adjudged guilty of perjury:" 2 R. S. 681. The testimony offered to be proved was given before an officer of the court in a proceeding in an action, and was a fact tending directly to establish the main issue submitted to the referee, and therefore material.

As to the competency of a plaintiff as a witness in his own behalf, in an action for a divorce, before the amendments to the code in 1857, the law was well settled and understood. Since then there has been considerable conflict of opinion among the profession, and some on the bench. Although no case has yet been decided holding that, in an action between husband and wife, the parties were competent witnesses, it has been decided by the supreme court that where a husband and wife were co-defendants, they could be witnesses in their own behalf: *Marsh v. Potter*, 30 Barb. 506. The hearing in the divorce suit before the referee was after the amendments to the code in 1857, and that act, as thus amended (Code, sec. 399), entirely changed the rule of law as it formerly existed in the admission of parties as witnesses. This statute is very broad and comprehensive. It says: "A party to an action may be examined as a witness, the same as any other witness;" thus placing parties upon the same footing as other witnesses. No limitation, qualification, or restriction, is imposed by the law-making power, and the courts should refrain from imposing any unless required to do so by public policy. For the reasons advanced in *Marsh v. Potter*, 30 Barb. 506, I am of opinion that the code covers this case, and that the prisoner was a competent witness in his own behalf in the action for a divorce.

In thus holding, it does not follow that the evidence given on the hearing was admissible. On the contrary, I am clearly of the opinion that it was not. A rule of law intervenes to prevent it. It is well settled that neither husband nor wife are competent to prove non-access during wedlock, whatever may be the form of legal proceedings, or whoever may be the parties thereto: *King v. Rook*, 1 Wils. 340; *King v. Luffe*, 8 East, 203; *King v. Kea*, 11 Id. 132; *Queen v. Mansfield*, 1 Q. B. 444; *King v. Sourton*, 5 Ad. & El. 180. This rule was established independently of any possible motives of interest in the particular case, upon principles of public policy and

decency: *Goodright v. Moss*, Cowp. 594; and it has not been, and was not intended to be, changed or affected by the code.

Although the testimony inquired after was clearly incompetent and inadmissible in the action in which it was given, still its admission did not render it immaterial. The referee erred in receiving it; but that error did not destroy its materiality. Were it false, perjury could be predicated upon it. It was held in *Van Steenberg v. Kortz*, 10 Johns. 167, that a party erroneously sworn in his own behalf might be guilty of perjury, especially where the proceedings remained unreversed; and the doctrine of that case was approved in *Pratt v. Price*, 11 Wend. 128.

The second exception is to the decision of the court overruling the objection to the following question put to the divorced wife, viz.: "Have you ever had sexual intercourse with any person other than your husband?" The objection was not to the form of the question, and therefore the simple proposition is, whether the objection was properly overruled. There is no principle in the law, and no adjudged case, which would authorize the exclusion of the testimony called for by that question. On the contrary, it has been adjudged that a witness, situated precisely as this witness was, in an action of *crim. con.*, was competent, and such testimony admissible: *Katcliffe v. Wales*, 1 Hill (N. Y), 63; *Babcock v. Booth*, 2 Id. 186 [38 Am. Dec. 578]. As the witness had been divorced, the objection rested on the fact that she had been the wife of the prisoner, and therefore incompetent to testify to anything that had occurred, even her own criminal act, during coverture. The proposition is, no doubt, fully established by the authorities, that even after the dissolution of the marriage contract, the husband and wife are not, in general, admissible to testify against each other as to any matter which occurred during the existence of that relation: *Monroe v. Twisleton*, Peake's Add. Cas. 219; *Doker v. Hasler*, Ry. & M. 198; *Barnes v. Camack*, 1 Barb. 392; *State v. Phelps*, 2 Tyler, 374; 1 Greenl. Ev., secs. 337, 338. In 1 Phillips's Evidence, 83, the reason of the rule is thus stated: "This," as Lord Ellenborough has said, "is on the ground that the confidence which subsisted between them at the time shall not be violated in consequence of any future separation." The general rule that the husband and wife will not be permitted to testify as to what occurred during the marriage relation, even after the marriage contract is dissolved, is no doubt a wise and salutary rule. Its object

is, that the most entire confidence may exist between them, and that there may be no apprehension that such confidence can at any time, or in any event, be violated, so far, at least, as regards any testimony or disclosure in a court of justice.

But the question now under consideration comes neither within the rule nor the principle of the rule. The witness was not called upon to betray any trust or confidence which the husband had reposed in her during coverture; nor did the fact which she was offered to prove come to her knowledge in consequence of the marriage relation. It called for acts independent of and outside her coverture. There is nothing, therefore, in the rule of law on this subject which would warrant the exclusion of her testimony in the present case.

In bastardy cases, where the mother is a married woman, it has been uniformly held that the wife was not a competent witness to prove the non-access of the husband; although, from the necessity of the thing, she has been constantly admitted to prove the criminal intercourse by which the child was begotten: *Ratcliffe v. Wales*, 1 Hill (N. Y.), 63, and other cases there cited.

But the principles laid down in the bastardy cases, and upon which the counsel for the prisoner seemed to rely, have no application to the question now under consideration.

Neither of the exceptions to the admission of evidence were well taken; and the judgment should be affirmed.

The court did not pass upon the question of the competency of husband and wife as witnesses against each other generally, in a suit between them.

All the judges concurred in other respects.

Judgment affirmed.

COMPETENCY OF HUSBAND OR WIFE AS WITNESS FOR OR AGAINST THE OTHER: See *Dickerman v. Graves*, 53 Am. Dec. 41, and note citing other cases 43. In an action in which the husband and wife are joined as parties, the husband is a competent witness on behalf of the wife: *Birdsall v. Patterson*, 57 N. Y. 47. In an action between the husband and wife, the wife may testify in her own behalf: *Rivenburgh v. Rivenburgh*, 47 Barb. 423. A married woman is competent to prove any fact which she did not learn from her husband, in actions between third parties: *Keator v. Dimmick*, 46 Id. 163; and is a competent witness on behalf of her children to prove the fact of marriage with her husband: *Christy v. Clarke*, 45 Id. 538. As a matter of public policy, confidential communications between husband and wife, during marriage, are protected from disclosure: *Aiken v. Baumann*, 17 Abb. Pr. 30, note; *Van Tassel v. Van Tassel*, 8 Abb. Pr., N. S., 9; S. C., 57 Barb. 239. In an action for

damages for criminal conversation, by a husband who has obtained a divorce from his wife for adultery with the defendant, the wife is competent to prove such criminal intercourse: *Carpenter v. White*, 46 Id. 292. All of the above cases cite the principal case.

NICHOLS v. MICHAEL.

[23 NEW YORK, 264.]

PROPERTY OBTAINED ON CREDIT, WITH PRECONCEIVED DESIGN ON PART OF PURCHASER to cheat and defraud vendor out of the same, may, upon discovery of the fraud by the vendor, be retaken, and the contract avoided, unless the property has passed to the possession of a *bona fide* holder for value.

VENDOR, TO WHOM VENDEE HAS GIVEN HIS NEGOTIABLE PROMISSORY NOTE for goods, is not bound to tender such note at the time of rescinding the contract; it is sufficient if he produce it upon the trial, and deliver it into the custody of the court.

FRAUDULENT REPRESENTATIONS, TO AVOID SALE, need not be such as would sustain an indictment for obtaining goods under false pretenses.

FRAUDULENT VENDEE OF GOODS AND HIS ASSIGNEE THEREOF for benefit of creditors are liable to a joint action by the vendor to recover possession.

ACTION to recover possession of certain goods. Plaintiff alleged that one Pinner had purchased goods of him on credit, representing that he was solvent, and giving his notes for the price at four and six months; that such representations were fraudulent, and that Pinner was insolvent at the time, and did actually, within four months afterwards, make an assignment for the benefit of his creditors, and that the goods so obtained were in the hands of the assignee Michael. The court, besides the charge mentioned in the opinion, charged the jury as follows: "If Pinner was insolvent, and concealed the fact of his insolvency with the design of procuring the goods and not paying for them, it was a fraud which rendered the sale void if the plaintiffs so chose to regard it. . . . The point of inquiry in such case is, whether there was a preconceived design not to pay for the goods; that inquiry the jury must solve, taking into consideration the concealment and all the attendant and subsequent circumstances admitted in evidence, which may serve to throw light upon it. . . . If the jury find no other fraud in the case than the omission of Pinner to disclose his insolvency, it will not be sufficient to avoid the sale. . . . A concealment on the part of the purchaser of his state of insolvency, known to himself at the time, accompanied by a preconceived design not to pay for the goods pur-

rule was that detinue would lie wherever the defendant had been in possession, whether he retained it, or had wrongfully parted with it." In this state, the action of detinue was abolished by the revised statutes, and that of replevin extended so as to serve all the purposes of both actions, and under that statute the action of replevin would lie, although the defendant had parted with the property: 2 R. S. 522, secs. 11, 19; *Snow v. Roy*, 22 Wend. 602.

The second chapter of title 7, part 2, of the code, sections 206, 207, etc., entitled "Claim and delivery of personal property," is a substitute for the action of replevin, as given by the revised statutes, and such an action may now be brought in all the cases where replevin would formerly lie. Some conflict has existed in the courts on the question, whether an action under the code could be maintained, to recover the possession of personal property when the defendant had not the possession either in law or fact at its commencement. It was held in *Roberts v. Randel*, 3 Sandf. 707, by the superior court at general term, that it could not. That was an action to recover a Texas bond; the question arose on an appeal from an order at chambers, discharging the defendant from arrest. The affidavit showed that the bond was delivered to the defendant to sell for not less than forty per cent on the principal and interest, which the defendant some months prior to the suit had sold for forty per cent on the principal only. The plaintiff had demanded the bond, or the amount of it at the price limited, which was refused. The court say: "By the plaintiff's own showing, the defendant had parted with the property long before the suit was commenced; and whatever it may be called, the suit is really one to recover damages for the conversion of the property." The order was affirmed. That case was followed at special term, in *Brockway v. Burnap*, 8 How. Pr. 188; S. C., 12 Barb. 347; and in *Elwood v. Smith*, 9 How. Pr. 528; but the case of *Brockway v. Burnap* was reversed at general term, 16 Barb. 309, and the court then held that an action to recover personal property could be maintained, notwithstanding the defendant had wrongfully parted with its possession before the suit was commenced. This we think the better rule, and we concur in the view therein expressed, that "the legislature did not intend by the code to abridge the former action of replevin as they found it; and that nothing therein prevents the present remedy, by an action to recover personal property, being as full, general, and complete as that action was under

the revised statutes." In this view of the case, an action properly laid against Pinner, notwithstanding he had assigned and delivered the property to Michael. He had fraudulently obtained the property and had it in his possession, and wrongfully parted with it. Michael was not a *bona fide* purchaser; the property was in his custody as trustee, for the benefit of Pinner's creditors, Pinner having an interest in the residuum after paying his debts. Here was such a connection as would sustain a joint action against the defendants. Pinner had fraudulently obtained the goods, and wrongfully transferred them to Michael to dispose of them as his trustee; Michael had the possession and refused to surrender it on demand. The code provides that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein: Sec. 118. Both these defendants claim an interest in the goods adverse to the plaintiffs; Pinner claiming that the purchase of the goods was free from fraud, and that they should be retained by his assignee, and disposed of for the benefit of creditors—Michael claiming the possession for the same purpose, and refusing to surrender on demand. They were properly joined as defendants.

The charge of the judge as to the degree of false representations was in accordance with the rule announced by this court in its former disposition of the case. The judge was also right in his refusal to charge as requested. That rule has no application where (as in this case) there was evidence of false representations at the time of making the purchases. It has application only when there is no proof of affirmative acts or representations, but rests wholly on the non-disclosure of insolvency.

That part of the charge which stated "that sufficient false representations in this case to avoid the sale need not be such a false representation as would be indictable under the statute against false pretenses," was also correct. If goods are obtained by fraud, the vendor may rescind the sale and follow his goods, whether such fraud be indictable or not. The right to rescind does not depend upon the provisions of the law for punishing the offender criminally. If there be fraud in the purchase, the sale is voidable at the option of the vendee: *Cary v. Hotailing*, 1 Hill (N. Y.), 311, 317 [37 Am. Dec. 323].

I have been unable to discover any error which calls for a

reversal of this case, and the judgment should therefore be affirmed, with costs.

SELDEN, J. There was no doubt sufficient evidence to justify the submission of this cause to the jury, upon the question of fraudulent misrepresentation and concealment on the part of Pinner, when he purchased the goods; and as the defendant Michael advanced nothing upon the faith of Pinner's title, he is in no better situation than Pinner himself. If the case was made out as to Pinner, the title of Michael under the assignment must of course fail, and he had no right to refuse to deliver the goods upon demand.

It is insisted that an action to recover possession will not lie against Pinner, because he was not in possession at the time of the commencement of the suit; and because his previous possession was rightful, no attempt having been made by the plaintiffs to rescind until after the assignment and delivery to Michael; and that at all events there can be no recovery against Pinner and Michael jointly. These objections are, I think, sufficiently answered by the cases of *Garth v. Howard*, 5 Car. & P. 346, and *Jones v. Dowle*, 9 Mee. & W. 19. In the first of these cases, the defendant Howard, being lawfully in possession of certain plate belonging to the plaintiff, had, without authority from the plaintiff, pledged it, with the other defendant, Fletcher, for two hundred pounds. The plaintiff demanded the plate of the latter, and then brought detinue against both. It was objected there, as it is here, that Howard had no possession at the time of the commencement of the suit, and hence the action would not lie against him. The court held that the action would lie against both. Tindal, C. J., said: "The verdict must pass against both defendants, as one could not stand in a better situation than the other." The decision in this case was put partly upon the ground that the defendant Howard had not assumed to part with the whole interest in the property, but retained some control over it by virtue of the right of redemption. But the chief justice also says: "The question is, whether Howard has wrongfully pledged. If he has done so, he is answerable." The other case, viz., *Jones v. Dowle*, 9 Mee. & W. 19, fully sustains the latter ground. There, the plaintiff had bought a picture at an auction, at which the defendant acted as auctioneer. The latter, by mistake, entered the name of one Clift as the purchaser, and delivered the picture to him. The plaintiff demanded the picture of Clift, who refused to deliver it, and

then brought detinue against the auctioneer. The counsel for the defendant insisted that the plaintiff was bound to show that the picture was in the possession or custody of the defendant, or of an agent over whom he could exercise control, at the time of bringing the action. But the court overruled the objection. Parke, B., said: "Detinue does not lie against him who never had possession of the chattel; but it does against him who once had, but has improperly parted with the possession of it."

The theory upon which these cases proceed is perfectly sound, and applies directly to the present case. It is, that where a person is in possession of goods belonging to another, which he is bound to deliver upon demand, if he, without authority from the owner, parts with that possession to one who refuses to deliver them, he is responsible in detinue equally with the party refusing. He contributes to the detention. It is the consequence of his own wrongful delivery. The action in such cases may properly be brought against both; because the acts of both unite in producing the detention.

It does not affect the principle that Pinner, in this case, came to the possession of the goods by delivery, and under the former purchase, and not as a trespasser. If they were fraudulently obtained, he had no right to retain possession for one moment as against the plaintiffs, and could transfer no such right to his assignee. The action proceeds, not upon the ground of a tortious taking, but of a wrongful detention; and to this Pinner has contributed by placing the goods in the possession of the defendant Michael, who refused to deliver them. The case cannot be distinguished in principle from the two English cases to which I have referred.

But it is further insisted that the plaintiffs should have been nonsuited, because they did not restore, or offer to restore, the notes of Pinner before commencing the suit. There is no doubt of the general rule, that where one party to a contract elects to rescind it for fraud, it is an indispensable preliminary that he surrender all that he has received from the other party upon the contract; and if he has disabled himself from doing this, it is too late to rescind. It has been held in several cases that this principle applies when the party seeking to rescind has received the promissory note of a third person as the consideration of the contract on his part. He must, in such cases, restore, or offer to restore, the note before bring-

ing the suit: *Masson v. Bovet*, 1 Denio, 69 [43 Am. Dec. 651]; *Baker v. Robbins*, 2 Id. 137. In the present case, the notes received by the plaintiffs were the notes, not of third persons, but of Pinner himself; and there is this important distinction to be observed, viz., that in the cases cited, the notes were not affected by the election of the party to rescind the contract, but might still be enforced notwithstanding the rescission; while, in this case, the moment the contract was rescinded, the notes, if in the hands of the plaintiffs, became entirely invalid and worthless. I am not aware that it has been held, that in such a case the restoration of the note is a condition precedent to the right of the party to rescind. It is intimated by Beardsley, J., in the case of *Baker v. Robbins*, 2 Denio, 137, that if the notes in that case had been shown to be of no value, it might not have been necessary to return them. The notes of Pinner, in this case, were of course rendered utterly valueless by the rescission of the contract. The rule has not, I think, been carried to the extent of holding that in such a case, the notes must be returned before a suit is brought. It would certainly be more in consonance with equity to hold it sufficient to produce the notes upon the trial, and surrender them to the custody of the court, as in that case the rights of both parties are protected. If the fraud is made out, and the contract subverted, the notes are void, and will be canceled by the court. On the other hand, if the plaintiff fail to establish the fraud, the notes can be restored to him if the nature of the contract is such that justice requires it. Such a rule is not, I think, in conflict either with authority or principle, and may therefore be safely adopted. The negotiability of the notes in this case is of no importance, so long as they have not been negotiated; nor do I think it would affect the rule if they had been at some period out of the hands of the plaintiffs, provided the possession and exclusive interest was in them at the time of the trial. The motion for a nonsuit, therefore, was properly denied.

The remaining questions arise upon the charge of the judge. He instructed the jury that if the defendant Pinner was insolvent, and concealed the fact of his insolvency with the design of procuring the goods and not paying for them, it was a fraud which would avoid the sale at the option of the plaintiffs. It seems to have been supposed by the counsel in this case, if not by the court below, that this instruction is in conflict with something said by myself, when this cause was here upon a

former occasion: *Nichols v. Pinner*, 18 N. Y. 295. My language must have been very inexplicit if what I then said will bear the interpretation which appears to have been given to it; as I am not conscious of having ever held an opinion on this subject differing in the slightest degree from that expressed by the judge before whom this cause was tried.

The principles I intended to assert were: 1. That a mere intention of a vendee not to pay for the goods he purchases, unaccompanied by any misrepresentation or concealment, is not such a fraud as will vitiate the sale; and 2. That the bare omission of a purchaser to disclose his insolvency at the time of the purchase, not accompanied by any attempt to defraud, is in like manner insufficient to destroy the contract. But I did not say that when the two are combined, that is, when the concealment of the fact of insolvency is accompanied by an actual intent to cheat, there is no fraud. That question was not presented by the case. The difficulty with the case at that time was, that the judge had not in his charge connected the two circumstances together, viz., the intent and the insolvency; but on the contrary, by his refusal to charge as requested, authorized the jury to infer that if they should find that Pinner was insolvent and omitted to disclose the fact, although without any fraudulent intent, their verdict should be for the plaintiff. This was a manifest error, and for that the judgment was reversed.

The judge, upon one construction of a portion of his charge, appeared to have instructed the jury that although Pinner was not insolvent, and was guilty of no misrepresentation or concealment of any pre-existing fact, yet if, when he made the purchase, he intended to avoid paying for the goods, this would be such a fraud as would vitiate the sale. What was said in regard to the effect of a naked intent not to pay for goods purchased was designed to meet this view of the charge. There can, I apprehend, be no doubt of the correctness of the doctrine then advanced upon this subject.

The jury were further instructed that, in order to avoid a sale for fraud, the false representation need not be such as would be indictable under the statute against false pretenses; and to this the counsel excepted. This exception is clearly untenable. The only case which appears to afford any countenance to the doctrine contended for is that of *Cross v. Peters*, 1 Me. 378 [10 Am. Dec. 78]. Such a position was not necessary to the decision of that case, and the reasoning in its sup-

port is, I think, unsatisfactory. The judgment should be affirmed.

All the judges concurred.

Judgment affirmed.

FRAUD IN PURCHASE OF GOODS AND EVIDENCE THEREOF: See *Hall v. Naylor*, 75 Am. Dec. 269, and note. As to rescission of sale for fraud, see the note to *Bryant v. Isburgh*, 74 Id. 655, and cases cited therein. Fraud on the part of the purchaser in obtaining the goods, to authorize a rescission, must be actual and intentional, and not a mere omission: *Farrington v. Bullard*, 40 Barb. 516. The fact that the vendee was insolvent at the time of sale, and knew it, and failed to disclose that fact to the vendor, of itself would not constitute fraud which would avoid the sale: *Garbutt v. Bank*, 22 Wis. 392; *Dale v. Jacobs*, 41 How. Pr. 94; *Hennequin v. Naylor*, 24 N. Y. 140; *Wright v. Brown*, 67 Id. 4; but would be a circumstance to be considered with reference to the general design which the vendee had in view: *Kennedy v. Thorp*, 3 Abb. Pr., N. S., 135; S. C., 2 Daly, 261; but if the vendee uses other means which are fraudulent, as directly representing his solvency, and that he owns property, which in truth he does not own, he commits a fraud, which will justify the vendor in rescinding the sale: *Kline v. Baker*, 99 Mass. 256; *Fish v. Payne*, 7 Hun, 587; *Devoe v. Brandt*, 53 N. Y. 465. Where the property was purchased on credit, with the preconceived design not to pay for it, the vendor, as soon as he discovers the fraud, may rescind the sale, and retake the property, if it has not passed to a *bona fide* holder for value: *Byrd v. Hall*, 1 Abb. App. Dec. 287; S. C., 2 Keyes, 647; *Johnson v. Moneil*, 2 Abb. App. Dec. 479; S. C., 2 Keyes, 665; *Dale v. Jacobs*, 10 Abb. Pr., N. S., 386, all citing the principal case.

PARTY RESCINDING CONTRACT MUST DO EQUITY, and return any consideration of value when possible: See note to *Bryant v. Isburgh*, 74 Am. Dec. 657. Where the consideration is worthless, as would be the party's own note where he is insolvent, a tender at the trial is sufficient: *Thurston v. Blanchard*, 33 Id. 700, and note. Such tender would be sufficient because it would put the defendant in the same position as if the offer had been made before suit: See the principal case cited to this effect in *Ryan v. Brant*, 42 Ill. 85; *Albright v. Griffin*, 78 Ind. 191; *White v. Dodds*, 18 Abb. Pr. 253; S. C., 42 Barb. 561; S. C., 28 How. Pr. 201; *King v. Fitch*, 2 Abb. App. Dec. 516; S. C., 1 Keyes, 450; *Fruschieris v. Henriques*, 36 Barb. 283; *Pequeno v. Taylor*, 38 Id. 388; *Central Bank v. Pindar*, 46 Id. 469; *Blakeley v. Jacobson*, 9 Bosw. 154; *Royce v. Watrous*, 7 Daly, 91; *Anthony v. Day*, 52 How. Pr. 39; *Dowd v. Griswold*, 4 Hun, 556; *Whitaker v. Whitaker*, Id. 810; *Naugantuck Cut. Co. v. Babcock*, 22 Hun, 487; *Butler v. Reynolds*, 3 Thomp. & C. 244; *Lowman v. Yates*, 37 N. Y. 607; *Harris v. Equitable L. I. Co.*, 6 Thomp. & C. 116; *Miller v. Woods*, 21 Ohio St. 487. Where, however, the article is not worthless, and the defendant may be injured by a failure to make the tender until the trial, the offer may be held insufficient and bad; as where the consideration consisted of the notes of a third person who was solvent at the time of commencing the action: *Masson v. Bovet*, 43 Am. Dec. 651. Where the consideration consisted of a check, the defendant cannot assume that it was worthless, but should make a proper return or tender of it: *Kimney v. Kiernan*, 2 Lana. 496; *Bradford v. Fox*, 38 N. Y. 292; but the tender of a check at the trial

has been held sufficient: *Woodin v. Frazee*, 6 Jones & S. 195, all citing the principal case.

FRAUDULENT REPRESENTATIONS TO AVOID SALE need not be such as would be punishable criminally on an indictment for obtaining goods on false pretenses: *Cary v. Hotailing*, 37 Am. Dec. 323.

FRAUDULENT VENDEE OF GOODS AND HIS ASSIGNEE ARE LIABLE JOINTLY IN REPLEVIN: *Collier v. Brickley*, 33 Ohio St. 531; *Jessop v. Miller*, 2 Abb. App. Dec. 456; S. C., 1 Keyes, 330; *Latimer v. Wheeler*, 3 Abb. App. Dec. 38; S. C., 1 Keyes, 470; *Corsan v. Oliver*, 2 Abb. N. C. 356; *Ellis v. Lersner*, 48 Barb. 546; *Joslin v. Cowee*, 60 Id. 55; *White v. Sweeny*, 4 Daly, 224; *Barnett v. Snelling*, 70 N. Y. 494. A party in possession cannot avoid replevin by a wrongful transfer of the possession to another: *Washington v. Lowe*, 34 Ark. 104; *Dunham v. Troy Union R. R. Co.*, 1 Abb. App. Dec. 586; S. C., 3 Keyes, 546; *Ross v. Cassidy*, 27 How. Pr. 421; *Christie v. Corbett*, 34 Id. 25; *Noesser v. Corwin*, 36 Id. 541; *Barnett v. Snelling*, 54 Id. 125; S. C., 9 Hun, 237. All of the above cases cite the principal case.

Actions for delivery of property are substitutes for replevin, under the old practice in New York, and are the same in nature, if not in name: *Baxter v. Putney*, 37 How. Pr. 143; *Bullis v. Montgomery*, 50 N. Y. 355, citing the principal case.

BEEKMAN v. BONSOR.

[28 NEW YORK, 298.]

GIFT TO CHARITY VOID AT LAW FOR WANT OF ASCERTAINED BENEFICIARY will nevertheless be upheld, if the thing given be certain, if there is a competent trustee to take and administer the fund as directed, and if the charity itself be precise and definite.

CHARITABLE TRUSTS MUST BE CAPABLE OF EXECUTION BY JUDICIAL DECREE in affirmance of the gift as the donor made it; the *cy pres* power, as exercised in England in cases of charities, not existing in New York.

CHARITABLE GIFT OF SUM WHICH IS LEFT UNCERTAIN, or in the discretion of executors who have renounced the trust, is void, and next of kin are entitled to the fund, such defect being incurable, even by the *cy pres* power.

EXECUTOR RENOUNCING HIS OFFICE IS DEEMED TO HAVE ALSO RENOUNCED TRUSTS conferred by the will, which are personal and discretionary, especially where the renunciation is followed by many years of total non-interference with the estate.

GIFT OF MONEY IN TRUST TO EXECUTORS, to be applied in their discretion to the use of societies for the support of indigent and respectable females, without further designation of the beneficiaries, where such executors have renounced the trust, cannot be upheld.

IF, UNDER DISPOSITION OF RESIDUUM OF PERSONAL ESTATE by will in two parts, the first disposition be invalid, the sum which it was the purpose thereby to dispose of does not go to the legatee of the other part, but to the next of kin of decedent.

WHERE, UNDER WILL, SUM OF MONEY IS DISPOSED OF in two parts, one of which is to be applied to a certain purpose before the remainder as the second part is disposed of, and the sum devoted to the prior purpose cannot be ascertained by reason of the failure of that purpose or otherwise, the gift of the remainder is void for uncertainty in the amount.

BEQUEST OF SUM OF MONEY TO BE INVESTED IN LAND, of which the rents and profits are to be applied to the use of certain beneficiaries during fifteen years, and the land then to be sold, and the proceeds divided amongst the same persons, is void, because it contemplates a trust which would unlawfully suspend the power of alienation.

BEQUEST LEAVING SUM NOT EXCEEDING CERTAIN LIMIT in the discretion of executors who have renounced wholly fails, because the amount is uncertain; and the gift cannot be sustained as a pecuniary legacy by disregarding directions (void because they unlawfully suspend the power of alienation) to convert such money into land, apply the proceeds for fifteen years to the benefit of certain persons, and then reconvert it into money, and divide it among the same persons.

BEQUEST OF MONEY TO BE LAID OUT IN LANDS FOR BENEFIT OF ALIENS, who are to have the possession and enjoyment, is in contravention of the New York statute concerning wills, and is therefore void.

ACTION to procure judicial construction of last will and testament of William Barthrop, deceased. The will provided, so far as material to this case, as follows: "I will that my executors purchase a farm in trust for the benefit of my nephews and nieces, children of my sister Mary Bonsor, of Nottingham, in England, not exceeding six thousand dollars, as an asylum, and it is my wish they come and occupy the same, especially my nephew Henry, but my executors must have full power over the same for fifteen years, for the benefit of all my nephews and nieces as they think fit, and after the fifteen years is expired, they may sell the same, and apportion the avails among them or their heirs or survivors, as they think just, and if any of my nephews and nieces cavil or dispute with the arrangements my executors make for their mutual benefit, I will that they receive no part thereof." Then followed the provision for a dispensary, set out in the opinion. The testator then provided as follows: "I say it is my will that my executors have a discretionary power, or a majority of them, within fifteen years after my decease, to pay over what remains after all legacies are paid, the residue and remainder of moneys arising from my worldly goods and effects, to such charitable societies for indigent and respectable persons, especially females and orphans, as they in their discretion shall think of." The final residuary clause is as follows: "And in the second place, after satisfying the provisions in my will, in regard to the dispensary mentioned in my will, or in the first codicil thereto, I give and bequeath all my estate then remaining, if any there shall be, to my executors in trust, that they shall and may pay and apply the same in such sums, and at such time and times, as in their

discretion they shall think fit and proper, to the treasurer or other officer having the management of the pecuniary affairs of any one or more societies for the support of indigent respectable persons, especially females and orphans, and for the use of said society or societies; hereby intending to give to my executors full discretionary power as to the disposition of the same, but so as that the same shall be applied to objects of charity." The three provisions of the will above were claimed by the plaintiff to be invalid. The remaining facts are stated in the opinion.

John H. Reynolds, for the people, appellants.

A. Underhill, for the Bonsors.

John Van Buren, and *William Curtis Noyes*, for the respondent.

By Court, COMSTOCK, C. J. It will be convenient to consider, first, that part of the will which relates to the establishment of a dispensary for indigent sick and lame persons. By that provision, the testator declared that he "would wish a public dispensary, as in New York, on a similar plan, for indigent persons. both sick and lame, to be attended by a physician elected to the establishment, at their own houses, and also daily at the establishment. My executors to consult judicious men in Albany respecting the same, and funds enough to carry on the building and yearly expenses." According to one construction of this clause—a construction certainly plausible—a discretion was reposed in the executors to determine the location of the proposed establishment, its extent and particular characteristics, and the amount of funds to be devoted to the object. The actual exercise of that discretion by those in whom it was confided might, by rendering uncertainty certain, relieve the bequest from the objections arising out of its vague and indefinite character. The will of a testator may be ascertained by the acts of those to whom he has intrusted discretion and power. Such acts may be justly regarded as the definite expression of his own purpose.

But in this view of the present question, the objections encountered are, that the discretion was personal to the individuals appointed to be executors, and that they renounced the trust. That the discretion was personal and not official, it hardly needs argument to prove. The duties to be performed were of a responsible and delicate character; and they were certainly

distinct from those which are usually devolved on the office of executor. For the performance of these duties, the testator selected the persons in whose integrity and fitness he was willing to confide; and he made no provision for a devolution of the trust upon any one else in any event whatever. The plaintiff is the administrator with the will annexed; but he cannot, in that character, execute powers and trusts which were personal to the executors who have renounced. The statute, it is true, provides that "in all cases where letters of administration with the will annexed shall be granted, the will of the deceased shall be observed and performed; and the administrators with such wills shall have the same rights and powers, and be subject to the same duties, as if they had been named executors in such will:" 2 R. S. 72, sec. 22. This statute has not been understood as introducing any new principle of law: *Dimmick v. Michael*, 4 Sandf. 409, 410; *Egerton v. Conklin*, 25 Wend. 233. Its terms, broad as they are, do not embrace a case like the present. "The will of the deceased shall be observed," etc. But the precise difficulty here is, that the will of the testator, in the respect under consideration, has not been declared. His intentions, as we are now assuming, were indefinite and unexpressed, and were to take a determinate form and expression only in the discretionary acts of the persons named as executors. Trusts and powers, perfectly defined, relating to the personal estate of a testator, without doubt devolve on the administrator *cum testamento annexo*. But he does not, in virtue of his office, succeed to a power which is personal in its very nature, and which is intended by its author to be executed only by the individuals to whom he has intrusted it.

The written renunciation of the executors, filed in the office of the surrogate, was in terms of their office as such. That renunciation has been followed by twenty years' of non-interference with the estate of the decedent, in any character whatsoever. They have never taken any step in the direction of giving effect to the charities confided to their judgment and discretion. In behalf of these charities, it has been argued that, although the assets of the deceased passed into the hands of the administrator, yet the personal trust reposed in the executors still lives, and is capable of execution. But their renunciation of the executorial office, followed by this long period of inactivity, can mean no less than an absolute and final abdication of the trusts contained in the will. They had a right to take that course. Conceding that they might, if

they had chosen so to do, devise a plan for a dispensary, appoint the place of its location, and designate the necessary amount of funds, so that a court of equity might compel the administrator to appropriate the sum required, yet they were under no legal obligation to perform these acts. Having refused to qualify as executors, they never became accountable for any portion of the estate to be applied in charity or otherwise. Rejecting, then, the estate and the executorial duties which the testator wished to cast upon them, they certainly were not bound to accept any peculiar and still more confidential relations which the will proposed. A testamentary direction requiring some portion of an estate to be applied by the executor to a charitable object—the plan of the charity and the sum necessary for its execution to be designated by some person not the executor—might perhaps be enforced, if the person named elected to accept the personal trust and make the designation or appointment. But it is extremely plain that such acceptance must be voluntary. The right of renouncing a trust which has no necessary connection with the office of executor is no less clear than the right of renouncing the office itself; and in either instance, the right rests upon the very simple and elementary proposition that no man can be compelled against his own will to execute the testamentary wishes of another: *Burritt v. Silliman*, 13 N. Y. 93 [64 Am. Dec. 532].

The argument, therefore, for sustaining this provision of the will, founded on a supposed discretion in the executors, the exercise of which might render the testator's wishes definite and certain, must fall to the ground. Upon all the facts before us, their renunciation of all right or intention to act must be deemed final and the discretion extinct and gone. Intestacy as to any portion of the estate designed for the dispensary is the necessary result; because, in this view of the subject, the testator has failed to speak: *Fontain v. Ravenel*, 17 How. 369. I am speaking here of intestacy according to legal rules. The *cy pres* power of courts of equity, where charity is the purpose or object of a bequest which is void or inoperative at law, will be hereafter considered.

If, taking another view of the provision in question, we say that the executors were not appointed to be the authors of a scheme for the proposed dispensary, with discretionary powers as to the amount of endowment and other circumstances, we shall find the difficulties still more obvious. All that we can

ascertain from the language of the testator is, that he had in his mind a vague and shadowy conception of a dispensary, similar to those in the city of New York, without any determinate views as to the place of its foundation, the mode of perpetuating and governing it, or the amount of expenditure and investment necessary to establish and maintain it. Putting aside, as we now do, the idea of a delegated discretion which might cure these defects, there are wanting all the elements of certainty which are necessary to impart validity to this bequest. The testator, in effect, declared that he devoted a blank sum of money to found and perpetuate an institution of charity, which, in his mind, was also a blank as to everything except the general purpose which he designed to promote. Here is a fatal uncertainty, both as to the subject and the object of the bequest. It needs no authority to prove that such a provision is void, when tested by the rules of law. If the testator neither specified how much of his estate he desired to give to this charity, nor furnished the means of ascertaining the sum through a delegated discretion or otherwise, the legal result plainly is that he gave nothing at all, and his next of kin are entitled to take the fund. The same conclusion may be derived from the consideration that there is no donee of the gift; by which is meant a donee to take the legal interest in the fund, and apply and dispense it in furtherance of the testator's charitable intent. Of course, the executors, if they had qualified, would have taken the legal interest in all the testator's personal estate in virtue of their office. But they were not appointed the trustees of this charity, nor was the fund specially bequeathed to them in that character. They might consult with judicious men, and perhaps determine, in their discretion, upon some plan of the charity, and upon the sum of money required to effectuate it. But there their duties and powers would end, because they are not appointed to take the title of the proposed establishment, or to retain and invest the capital sum necessary to support it. In this respect, the will is a blank. As there is no person or corporate body appointed to take the bequest, the necessary legal consequence is that it fails altogether.

There is, then, no principle of law or rule of equity regulating trusts, other than charitable, which will support this bequest. The inquiry, therefore, now is, whether there is anything in the law of charitable uses, as a peculiar system, by which it can be sustained. The English law on this subject is derived from the

jurisdiction of the court of chancery over trusts, from the prerogative of the crown, and from the statute of 43 Eliz., c. 4: *Owens v. Missionary Society*, 14 N. Y. 387 [67 Am. Dec. 160]. In this state, we have no royal prerogative, and the statute of Elizabeth was repealed by the legislature in 1788. Our system of charity law, therefore, derives nothing from either of these two sources; and its origin must, consequently, be referred to the jurisdiction which the English court of chancery exercised, independently of prerogative and of the statute of Elizabeth. What was the extent of that jurisdiction over charitable trusts? Was it restricted precisely by the rules which regulate other trusts? Did it transcend those rules? And if so, to what extent, and in what cases? These are inquiries which have occupied the ablest judicial minds in this country, and great diversity of opinion has been the result. This diversity, perhaps, sufficiently proves that the inquiries are incapable of a perfectly exact solution. Nor is such a solution of fundamental importance. The courts of this state will confine themselves to powers which are strictly judicial; and under that limitation, they may be deemed competent to determine what is and what is not a valid and effectual charitable donation. The English system of law on this subject, derived from the three sources mentioned, is confessedly much more comprehensive than ours. If we are unable to ascertain with entire accuracy how much of that system is derived from any one of these sources in exclusion of the others, we may, at least, determine how much of the blended mass is adapted to our own situation and wants, being careful, however, not to transcend the limits of judicial authority.

There are two cases recently decided in this court which deserve a particular attention, because the principles expressly asserted in the one, and conceded if not affirmed in the other, are decisive of the present question. In *Williams v. Williams*, 8 N. Y. 527, a testator bequeathed the sum of six thousand dollars to three trustees as a fund for the education of poor children at the academy in the village of Huntington, to be taken from those whose parents' names were not in the tax list. The trustees, to whom the legacy was given, were constituted a board for the management of the fund; and as vacancies might occur, the mode of supplying them in perpetuity was pointed out. Particular directions were given for the investment of the sum, and the accumulation and appropriation of the interest. In the opinion of the court, deliv-

ered by Judge Denio, it was assumed that the bequest, according to the general rules of law, would be void for want of an ascertained *cestui que trust*, in whom the equitable title would vest (p. 540); it being justly considered that the "children of the poor" were quite too indefinite a class to be entitled in law to take as beneficiaries. Notwithstanding this assumption, the bequest was sustained. The learned judge examined at some length the English doctrine of charitable uses, and he stated his conclusion to be that the law of charities was, at an indefinite but early period, ingrafted upon the common law, and that the statute of Elizabeth was not introductory of any new principles, but was only a new and less dilatory and expensive method of establishing charitable donations understood to be valid by the laws antecedently in force (p. 542). The opinion, however, not merely conceded, but maintained, that under our political system, with its precise distribution of the powers of government, the English law on this subject is in force here only so far as it is capable of administration in the exercise of strictly judicial power. "We have no magistrate," it was observed, "clothed with the prerogatives of the crown, and our courts of justice are intrusted only with judicial authority." The *cy pres* doctrine of the English chancery, in other words, the right of making an approximate or discretionary will for a testator, where he has only declared some indefinite, illegal, or ineffectual charitable purpose, was distinctly disavowed. The case itself must be viewed as a well-considered authority for the proposition that a charitable gift, definite both in its subject and purpose, and made to a definite trustee, who is to receive the fund and apply it in the manner specified, is to be maintained, although it would be void by the general rules of law, because the particular objects of the gift, or persons to be benefited by it, are unascertained. Such a gift is capable of being enforced by a judicial sentence; and it affords neither room nor justification for an exercise of the *cy pres* power. So much, then, of that which is peculiar in the English system of charitable trusts ought to be considered as settled in the jurisprudence of this state. But beyond this we cannot go, without exercising functions which are not judicial; which, in England, rest on prerogative, and are there exercised by the sign-manual of the sovereign, or by the court of chancery as the keeper of his conscience.

The other case to be particularly noticed is *Owens v. Mis-*

tionary Society of the Methodist Episcopal Church, 14 N. Y. 380 [67 Am. Dec. 160], determined three years later. In that case, the bequest was of the residue of the testator's estate to "the Methodist General American Missionary Society appointed to preach the gospel to the poor, L. C." That society was unincorporated at the time of the testator's decease, and the gift was directly to it, without the intervention of any trustee to take and administer the fund and maintain the charity. An opinion, concurred in by a majority of this court, was delivered by Judge Selden, in which, with great learning and research, he traced the jurisdiction of the English chancery over charitable uses to its respective sources; and he came to the conclusion that the peculiar features of that system of law were derived from the statute of 43 Elizabeth, and consequently that those peculiarities are no part of the law of this state. The bequest was adjudged to be void; a majority of the judges assenting to that conclusion, not only upon the basis laid down in that opinion, but also on the ground that the indefiniteness of the charitable purpose indicated by the testator would vitiate the gift, even according to the English law. There is certainly a want of coincidence between the opinion of Judge Selden and that of Judge Denio, in the previous case, upon a question of juridical history, which I am inclined to think is not one of fundamental importance. We are justified in so thinking, because the diversity of views on that question led to no practical difference in conclusion or result. The authority of *Williams v. Williams*, 8 N. Y. 527, was conceded in the later case, the distinction taken being that in the one case there was a competent trustee of the fund, while in the other there was not. And to avoid all misapprehension, Judge Selden qualified the result of his opinion by conceding that "courts of equity in this state have power to enforce the execution of trusts created for public and charitable purposes in cases where the fund is given to a trustee competent to take, and where the charitable use is so far defined as to be capable of being specifically executed by the authority of the court, even although no certain beneficiary, other than the public at large, may be designated." Now, this concession yields all that was claimed or determined in the previous case, while the concession in that case yields all that was determined in this. The joint authority of both decisions establishes these propositions: 1. That a gift to charity is maintainable in this state if made to a competent trustee, and if so defined that it

can be executed as made by the donor by a judicial decree, although it may be void according to general rules of law for want of an ascertained beneficiary; 2. In other respects, the rules of law applicable to charitable uses are within those which appertain to trusts in general; 3. The *cy pres* power, which constitutes the peculiar feature of the English system, and is exerted in determining gifts to charity where the donor has failed to define them, and in framing schemes of approximation near to or remote from the donor's true design, is unsuited to our institutions, and has no existence in the jurisprudence of this state on this subject. We ought to accept these rules as the law of this state, because they are the necessary result of the carefully considered decisions of this court which have been mentioned; and we think that a re-examination of the principles and authorities on which those decisions were based would now be inappropriate.

It is an obvious conclusion from these premises that the law of charities cannot be invoked in aid of the bequest now under consideration. It has been shown that, in one view of the will, the consummation of the testator's charitable purpose was referred to the judgment and discretion of the executors, and that the purpose has failed by their renunciation. As judicial power is exercised in the interpretation of wills, and in establishing them as made by testators, and not in framing them, this difficulty is incurable. In England, the *cy pres* power would be exerted in such a case; and a scheme would be devised by a master of the court of chancery, or the crown would appoint the charity under the sign-manual. In either mode of exercising that power, it rests upon prerogative, and is a creative energy, which, as we have seen, does not belong to our judicial system. In *Fontain v. Ravenel*, 17 How. 369, the testator gave the residue of his estate to his executors to be disposed of for the use of such charitable institutions in Pennsylvania and South Carolina as they should deem most beneficial to mankind. Here was a power of selection to be exercised in the discretion of the executors. But they died before the period arrived when the selection could be made. The gift, therefore, could not be executed as the testator made it, and it was held that his heirs, or next of kin, were entitled to the fund. So, in this case, the executors having renounced, the discretion in which the testator confided is dead, and there is no power in us to reconstruct the gift which has failed as he intended to make it. And if we lay out of

view the element of discretion, either as not conferred by the will or as extinct by renunciation, we encounter a defect which would not be remediable, even according to the *cy pres* doctrine. The subject of the bequest, or thing intended to be given, is undefined. Of course, it was money, to be expended in founding and maintaining a dispensary; but there are no means of ascertaining the sum which the testator intended to give. In such a case, even prerogative would hesitate to declare how much of the estate should be taken from those who are by law entitled to all that is not effectually disposed of by the testator himself; and I think that, among all the extreme cases determined by the English courts in favor of charities, none can be found giving effect to a gift which is void in law for the reason here suggested. It is the indefiniteness of the object and purpose of a charitable donation, and the impossibility of effectuating it as the donor intended, which have furnished occasion in so many cases for the exercise of the *cy pres* power. But in all the cases, I think it will be found that the donor did not leave in hopeless uncertainty the gift itself.

The sum intended for the dispensary was to be taken from the residuum of the testator's estate, after satisfying certain enumerated legacies. That object being provided for, the testator then bequeathed his remaining estate to his executors in trust, to apply the same, in their discretion, as "they should think fit and proper," to the treasurer or other officer having the pecuniary management of any one or more societies for the support of indigent and respectable persons, especially females and orphans, and for the use of said societies; and he declared it to be his intention to give to his executors discretionary power as to the disposition of the fund, so that it be applied to objects of charity. This provision will require but a brief consideration. The first inquiry is, whether the sum designed for a dispensary, in consequence of the failure of that purpose, goes to the next of kin as undisposed of, or falls into the ultimate remainder under this clause. If the latter, then the whole residue of the estate, after satisfying the specific bequests, is given to the executors for the charitable purposes mentioned in the final clause. But such is not the construction or effect of this provision. The general rule undoubtedly is, that in a will of personal estate a general residuary clause carries to the residuary legatees whatever is not otherwise legally and effectually disposed of. Such is the presumed

intention of the testator in most cases. But the authorities do not apply this doctrine where the bequest is of the residue of a residue, and the first disposition fails. The opposite rule, I think, universally prevails in such cases. In the case of *Skrymsher v. Northcote*, 1 Swanst. 570, the master of the rolls said: "It seems clear on the authorities that a part of the residue of which the disposition fails will not accrue in augmentation of the remaining parts as a residue of a residue; but instead of resuming the nature of residue, devolves as undisposed of:" Ward on Legacies, 32, and cases cited, 18 Law Lib.; *Floyd v. Barker*, 1 Paige, 480; *Attorney-General v. Davies*, 9 Ves. 535.

Now, we have seen that the sum which the testator intended to give for a dispensary was wholly uncertain in amount, and that the bequest was void on that and other grounds. As that portion of the residuum must go to the next of kin as undisposed of, the final gift of the remainder involves precisely the same uncertainty, and is void for the same reason. In order to ascertain the amount of this gift, the sum intended to be previously appropriated out of the whole residue must first be known. But as that cannot be known, the ultimate bequest falls to the ground also. This is clear in reason and logic, and it is well settled by authority.

In *Chapman v. Brown*, 6 Ves. 404, a testatrix gave a residue of her estate to her executors in trust: 1. To build a chapel, but devoting no particular sum to that object; 2. If there should be any overplus for the support of a preacher not exceeding twenty pounds a year; and 3. If any further overplus, the sum was to be expended in such charities as the executors should think proper. Here was a residuum divided into three parts. The first gift was adjudged void, as against the laws of mortmain. The second, being dependent upon the first, failed also. As the chapel could not be built, no preacher was wanted. The third and last, standing by itself, was conceded to be good, according to the law of charitable uses in England. But the objection to it was, that the amount of that bequest could not be ascertained without first determining what sum would have been required to build the chapel, which, together with the twenty pounds per annum for the preacher, did not fall into the ultimate residuum, but went to the heirs and next of kin. But that sum was held to be incapable of ascertainment, because the chapel was not to be built, and the final remainder to general charity was, therefore, equally uncertain. That

bequest was also adjudged to be void on this ground alone, and the whole residuary estate was consequently declared to be undisposed of by the will. This decision, which has always been recognized as a sound one, not only establishes the point to which it is here cited, but it verifies also the observation before made, that a legal uncertainty in the subject of a gift is incurable, even by the law of charities in England. A similar decision was made in the case of *Attorney-General v. Hinxman*, 2 Jac. & W. 270. Again it was held in *Limbrey v. Gurr*, 6 Madd. 151, that where a residue is given to a valid purpose it fails with a prior void purpose, if not capable of being ascertained, except by the actual execution of that purpose. The valid purpose in that case was also a charity.

The final bequest, therefore, in the case now before us, was void for the reason that the remainder of the residuary estate intended to pass to the executors under that request, is incapable of being ascertained. It is also void by reason of the indefiniteness of the object of the gift. If this defect could be aided by an exercise of the unlimited discretion reposed in the executors, to whom the fund was given in trust, they have renounced, not only as executors, but as residuary legatees in trust also. On this branch of the question, enough has been said in examining the provision in regard to the dispensary.

The remaining question arises upon the provision which directed the executors to purchase a farm in trust for the benefit of the testator's nephews and nieces. I am of opinion that this clause was intended to create an express trust to receive the rents and profits of land, and apply them to the use of the beneficiaries designated; and consequently, that the trust, in its nature and kind, is permitted by our statute of uses and trusts: 1 R. S. 728, sec. 55. No technical or precise words are necessary in order to constitute such a trust. If the direction is such as to vest the title in the trustee; if his duties are active instead of passive; and if the possession is subjected to his control, so that he may, in his pleasure or discretion, exclude the beneficiary therefrom; and if, with these directions, there is no other declared purpose of the testator—a trust to receive the rents and profits is the necessary result of the arrangement. Rents and profits are the incidents of the possessory right; and certainly it is the duty of the trustee to pay them over or apply them to the use of the person for whose benefit the grant or devise is made.

In this case, the direction of the testator to the executors

was to invest six thousand dollars in the purchase of a farm in trust, etc. The meaning of this plainly is, that they were to take the legal title to themselves as trustees. The beneficiaries of this trust were the nephews and nieces of the testator, and a "wish" is expressed that they should "come and occupy" the farm; but this wish is qualified by an explicit declaration that such occupancy shall be subject to the absolute control of the executors, whose directions are to be followed without "cavil or dispute." They were to be, therefore, not merely passive trustees. Their duties were active, and they consisted in controlling the possession at their discretion for the benefit of the *cestuis que trust*. The latter were entitled only to the results—in other words, to the rents and profits. These they might receive directly as occupants, if the trustees permitted, or they might take them from the hands of the trustees themselves. Undoubtedly, a trust to receive and apply the rents and profits of land may be executed in either of these modes; and the expression of a wish by a testator in favor of one mode rather than the other does not deprive the trust of its real character, so long as the wish is so qualified as not to interfere with the discretion and power of the trustee.

But this trust, although as to its nature and kind, falling within the permitted class, is invalid, because it proposed an illegal suspension of the power of alienation. If the farm had been purchased according to the direction, both the legal estate of the trustees and the beneficial interest of the *cestuis que trust* would have been inalienable for a term of fifteen years. The beneficial interest in a trust to receive rents and profits is unassignable; and inasmuch as the trust declared by the testator in this case ought to appear on the face of the conveyance to the executors, any sale of the legal estate by them within the fifteen years would be in contravention of such trust, and would be void: 1 R. S. 730, secs. 63–65; *Hawley v. James*, 16 Wend. 61. But with one exception, not now material, the absolute power of alienation cannot be suspended for a longer period than during the continuance of not more than two lives in being at the creation of the estate: 1 R. S. 723, sec. 15. It has been repeatedly adjudged that any attempted suspension of this power, not dependent on lives, but for an absolute term of time, whether long or short, is a violation of the letter and policy of this provision of law: *Hawley v. James*, 16 Wend. 61; *Boynnton v. Hoyt*, 1 Denio, 53.

It seems to result, necessarily, that the direction in this will to invest the six thousand dollars in a farm upon the trusts mentioned was contrary to the statute, and void. This conclusion being clear, if I am right as to the trust and its character, it becomes unnecessary to inquire whether a trust to receive the rents and profits of land and apply them to the use of an alien beneficiary would be valid, if the trust were so constituted as to be free from any other objections.

If I am mistaken in supposing that the trust in question is of the character mentioned, and void as an attempt to suspend the power of alienation, the only alternative construction is, that the nephews and nieces of the testator (but for the difficulty arising from their alienage) would have been entitled, if the farm had been purchased, to the possession and to the rents and profits in exclusion of the executors. In that view, the trust attempted to be created would have been passive, and the nephews and nieces would take the legal estate. In this aspect, the trust would not be illegal or void, but the use would be executed by the statute of uses and trusts, and the legal title would vest in the beneficiaries: 1 R. S. 727, secs. 47, 49. The objection that they were aliens, however, stands in the way, not of this construction, but of the consequences which flow from it, because the statute of wills declares that a devise to an alien of any interest in land shall be void: 2 R. S. 57, sec. 4. A direction in a will that money be laid out in land to be conveyed to or for the benefit of an alien, so as to invest him with the possession and the rents and profits, would undoubtedly fall within that provision. It is impossible, therefore, in any view, to uphold this direction of the will.

At the end of the fifteen years, the executors were authorized to sell the land and distribute the proceeds among the nephews and nieces. This would have been a lawful trust, or power in trust, if the postponement of its execution for an absolute period of time did not suspend the power of alienation in a manner which the statute does not permit. That suspension is fatal to this trust also. It is to be observed, moreover, that inasmuch as the direction to purchase the land cannot be executed, for the reasons which have been given, so the authority to sell it and divide the proceeds necessarily falls to the ground with that direction.

The intention of testator was, that a sum of money should be laid out in land, and the rents and profits enjoyed by his nephews and nieces for fifteen years; that the land should

then be reconverted, and the money divided among them. The design to give the money to them was strictly lawful; and my first impression was, that the final bequest might take effect in their favor as a vested legacy, payable at the end of fifteen years from the testator's decease. To reach such a result, it is not required to execute the unlawful direction to purchase and hold the land, and then to sell and reconvert it. No conversion being in judgment of law possible, no reconversion is either necessary or possible. Disregarding those directions, the original gift was of money, and it was to be finally paid over in money at a certain future period. So much of the testator's intention might, therefore, be effectuated consistently with the rules of law, and without disturbing any other portion of his will. In this view of the subject, I think the legacy was vested in the beneficiaries in equal shares, subject to be divested as to the equality of division by an exercise of the discretionary power of apportionment given to the trustees: 1 Roper on Legacies, 1st Am. ed., 400, 402; Hill on Trustees, 79, and cases cited; *Dominick v. Sayre*, 3 Sandf. 555. I had proposed, therefore, to give effect, in the manner here suggested, to the testator's undoubted intention that his nephews and nieces should have the principal sum bequeathed, at the end of fifteen years. But my brethren find a difficulty which they think cannot be overcome. The direction is to invest a sum, not exceeding six thousand dollars, in a farm, etc. The maximum limit is fixed; but below that the amount to be thus invested was left wholly in the discretion of the executors. They might purchase a farm of any value below six thousand dollars. This discretion cannot now be exercised, because the executors have renounced. It was never capable of being exercised, because, as we have seen, the direction itself was unlawful and void. Viewing the bequest, therefore, as a vested pecuniary legacy, the sum given appears to be wholly undefined, and I acquiesce in the suggestion that this is fatal to the gift. The judgment of the supreme court must be affirmed.

All the judges agreed that the trust for the benefit of the nephews and nieces was void for the reason last assigned; all except DENIO and MASON, JJ., who adhered to the views expressed by the former in *Williams v. Williams*, 8 N. Y. 527, concurred in the opinion of COMSTOCK, C. J. SELDEN, J., however, took exception to some of its language in respect to the *cy pres* doctrine, holding that the court of chancery, in supplying defects of detail in the directions for the execution of the

trust by means of a scheme, exercised a power which was purely judicial, and to which our courts have succeeded.

Judgment affirmed.

GIFTS CREATING TRUSTS NOT EXPRESSLY AUTHORIZED BY STATUTE are void in New York: *Leonard v. Bell*, 1 Thomp. & C. 609; and charitable trusts are not excepted from the operation of the statute abolishing all uses and trusts except those expressly authorized: *Clemens v. Clemens*, 37 N. Y. 76, both citing the principal case. Merely passive trusts to suffer another to take and receive rents and profits are void: *Verdin v. Slocum*, 71 Id. 347; *Donovan v. Van De Mark*, 78 Id. 248, also citing the principal case.

DOCTRINE OF CY PRES HAS NO EXISTENCE in law of New York: *Bascom v. Albertson*, 34 N. Y. 590; nor in Kentucky: *Cromie v. Louisville etc. Soc.*, 3 Bush, 375; nor South Carolina: *Pringle v. Dorsey*, 3 Rich., N. S., 509, all citing the principal case.

GIFTS BY WILL INDEFINITELY SUSPENDING POWER OF ALIENATION are void: See *Leonard v. Bell*, 1 Thomp. & C. 609; *Gano v. McCunn*, 56 How. Pr. 343; *Blanchard v. Blanchard*, 4 Hun, 291; S. C., 6 Thomp. & C. 556; *Garvey v. McDevitt*, 11 Hun, 461; *Bascom v. Albertson*, 34 N. Y. 590, 593, 594. Power in trust, execution of which is directed after lapse of period beyond two lives in being, is void: *Quin v. Skinner*, 49 Barb. 135; S. C., 33 How. Pr. 236, citing the principal case.

TRUSTEE OR EXECUTOR MAY RENOUNCE OR REFUSE TO ACCEPT TRUST: See *Burritt v. Silliman*, 64 Am. Dec. 532; and see the principal case cited on this point in *Dunning v. Ocean Nat. Bank*, 6 Lans. 298. Where an executor renounces, the administrator appointed takes his place, and power co-extensive with that which was, or would have been taken by the executor whose place he fills: *Peterson v. Chemical Bank*, 27 How. Pr. 502; S. C., 2 Robt. 608; *Estate of Besley*, 18 Wis. 455, both citing the principal case.

LEGACIES MAY VEST IN INTEREST AT TIME OF DEATH OF TESTATOR, though the time of payment be postponed: *Oxley v. Lane*, 35 N. Y. 345, citing the principal case.

LAPSED LEGACIES, GENERALLY: See note to *Morton v. Bennett*, 39 Am. Dec. 582. On devise to two sons when they reach the age of twenty-one, but in case they both die before that time, then to another, the share of one of them who dies, if the other reaches the age of twenty-one, does not lapse, but goes to his personal representatives, for the event in which he could not take, to wit, the death of both, has not happened: *In re Goodrich*, 2 Redf. 47, citing the principal case.

GIFT BY WILL WHICH DESIGNATES NO DONEES OF LEGAL OR EQUITABLE TITLE IS VOID: *Bascom v. Albertson*, 34 N. Y. 590. And so where there is uncertainty both as to the subject and object of the bequest: *Heiss v. Murphy*, 40 Wis. 291; but where the gift is legal, definite as to the donee, and subject and object of the gift, and only requires a trustee to carry out the purpose of the donor, a court of equity may well act in preserving the trust fund from lapsing: *Starkweather v. American Bible Soc.*, 72 Ill. 58; *Levy v. Levy*, 40 Barb. 625; and the same rule, that a gift will be considered valid, is applied to personal property in such cases: *Holmes v. Mead*, 52 N. Y. 344. A will to be valid, as concerns a gift in trust, need not point out the plan by which a bequest is to be accomplished. It is sufficient if it appoints trustees with power to appropriate the money towards a definite object as they see fit:

Haines v. Allen, 78 Ind. 102; *Miller v. Teachout*, 24 Ohio St. 535, all citing the principal case.

DEVISES TO CORPORATIONS: See note to *McCartee v. Orphan Asylum*, 18 Am. Dec. 541. If a corporation is incompetent to receive a devise, a court of equity is certainly incompetent to appoint a trustee to act in place of the corporation, so as to effect the intent of the trust: *Chamberlain v. Chamberlain*, 3 Lans. 363, citing the principal case.

CHARITABLE USES, GENERALLY: See *Owens v. Missionary Soc.*, 67 Am. Dec. 160, and the extensive note thereto 184. The law of charitable uses, as it exists in England, does not exist in New York: *Levy v. Levy*, 33 N. Y. 120, citing the principal case. In *Ruth v. Oberbrunner*, 40 Wis. 257, the principal case is cited as a leading authority on the law of charitable trusts. As to charities void for uncertainty, see the note to *Bridges v. Pleasants*, 44 Am. Dec. 98, et seq. In *Owens v. Missionary Society*, 67 Id. 160, it is held that voluntary societies cannot take by devise, even for charitable or religious purposes, and that the incorporation of such an association after the testator's death will not strengthen its ability to take; and the principal case is cited to the same effect in *State v. Warren*, 28 Md. 354. A charitable gift, definite both in its subject and purpose, and made to a definite trustee who is to receive the fund and apply it in a manner specified, is to be maintained, although it would be void by the general rules of law, because the particular object of the gift or persons to be benefited are unascertained. Such a gift is capable of being enforced by judicial sentence, and affords neither room nor justification for an exercise of the *cy pres* power: *Zeiswiler v. James*, 63 Pa. St. 468; *Norris v. Thompson*, 19 N. J. Eq. 313; *Goddard v. Pomeroy*, 36 Barb. 555; *Dutch Ref. Church v. Brandon*, 52 Id. 233; *American Tract Society v. Atwater*, 30 Ohio St. 86; *Frierson v. General Ass'n Presbyterian Church*, 7 Heisk. 694, all citing the principal case.

GIFT BY WILL DOES NOT CREATE POWER IN TRUST IN EXECUTORS, where they in terms are excluded from receipt or control of the property, their powers being merely passive: *Henry v. Fitzgerald*, 65 Barb. 511; *Verdin v. Slocum*, 9 Hun, 152, citing the principal case.

PART OF RESIDUE OF GIFT BY WILL, of which the disposition fails, will not accrue in augmentation of the remaining parts as a residue of a residue; but instead of assuming the nature of a residue, it devolves as undisposed of: *Betts v. Betts*, 4 Abb. N. C. 421; *White v. Howard*, 52 Barb. 307; *Kerr v. Dougherty*, 79 N. Y. 346; *Strang v. Strang*, 4 Redf. 378.

SANFORD v. EIGHTH AVENUE RAILROAD COMPANY.

[28 NEW YORK, 343.]

PASSENGER ATTEMPTED TO BE EJECTED FROM RAILROAD CAR WHILE IN MOTION will, from the dangerous nature of such act, be justified in making the same resistance as he would to a direct attack on his life.

THOUGH PASSENGER IS LIABLE TO EJECTION IN PROPER MANNER FOR REFUSING TO PAY FARE, his resistance to an attempt to expel him without stopping the car does not present a case of contributory negligence on his part.

AS RAILROAD COMPANY DIRECTING CONDUCTOR TO EJECT PASSENGERS for failure to pay fare is responsible for his act in so doing, it becomes

also responsible for any circumstance of aggravation which attends the wrong.

WHERE TRIAL IS BY JURY, APPELLATE COURT IN NEW YORK has no power to review questions of fact determined in the lower court; and hence on an appeal from an order granting a new trial, the order will be affirmed if it can stand consistently with any view taken of the evidence given at the trial.

ACTION for damages to next of kin of plaintiff's intestate, resulting from his death by the wrongful act of defendants' agent, the conductor of its street car, in ejecting the intestate from such car while it was in motion. The facts appear in the opinion.

H. B. Cowles, for the appellant.

Aaron J. Vanderpoel, for the respondents.

By Court, COMSTOCK, C. J. Where the trial is by jury, we have no power, under the existing rules of law, to review any question of fact determined in the subordinate courts. In this case, therefore, we should be obliged to affirm the order granting a new trial, if that order could stand consistently with any view to be taken of the evidence given at the trial. But we are of opinion that, after giving to the defendant the benefit of whatever conflict there may be in the testimony, and after examining the facts proved in the light most favorable to him, the plaintiff was entitled to a verdict.

It is said, and such is the proof by one of the witnesses, that the intestate, on stepping upon the platform of the defendants' car, announced his intention not to pay the fare, alleging that he had paid it on the previous day without having been carried so far as he was entitled to go. On this ground, it is claimed that the relation of carrier and passenger never arose between the parties. But there is in this proposition nothing which requires a serious consideration. If the fact be as stated, the intestate might have been refused admission to a seat in the car. But he was allowed to pass in and sit down like other passengers, and the fare was afterwards demanded of him in the usual way. This conceded his right to take a seat, and his situation was that of any person who enters one of these cars and sits down as a passenger. Undoubtedly, it was his duty to pay the fare when demanded, but nothing anterior to his refusal so to do has anything to do with the present question.

In the next place, it must be conceded that the conductor

had a right to expel the intestate for the reason that he would not pay his fare when asked to do so. But this was not a right to be exercised in a manner regardless of all circumstances. A person cannot be thrown from a railroad train in rapid motion, without the most imminent danger to life; and although he may be justly liable to expulsion, he may lawfully resist an attempt to expel him in such a case. As the refusal of a passenger to pay fare will not justify a homicide, so it fails to justify any act which in itself puts human life in peril; and the passenger has the same right to repel an attempt to eject him when such an attempt will thus endanger him that he has to resist a direct attempt to take his life. The great law of self-preservation so plainly establishes this conclusion that no further argument can be necessary.

In this case, all the evidence shows that the conductor of the defendants' car, without arresting its motion, seized the plaintiff's intestate and forcibly ejected him. The danger attending such an act was enhanced by other circumstances. It was in the night, and a high bank of snow was thrown upon each side of the track. No injury might have resulted if the expulsion had taken place from the rear, instead of the front of the car. As a direct consequence of the conductor's act, the passenger was injured so that he died; and the act itself, under the circumstances stated, being necessarily attended with great danger, stands without a legal justification. It is said that the intestate offered resistance when he was thus seized. But this he had a right to do in order to save his life, which he had not forfeited by refusing to pay the fare. He was liable, as we said, to be expelled, and the conductor's assault would have been justified if the car had been stopped, and the expulsion had been made without unnecessary violence. But as the conductor had no right to make the assault when he did and as he did, so the law will justify such resistance as was offered to that assault.

The decision of the court below appears to have proceeded upon a rule of law which we think is inapplicable to the case. In the opinion of that court, it is conceded that the conductor was guilty of negligence and improper conduct in expelling the passenger without stopping the car. But the latter was also in the wrong in occupying a seat without paying the fare, and the case was put as one of concurring negligence where the injured party is without redress, because he is himself in fault. We fail to see how this principle can be invoked. It

cannot be applied to an intentional trespass, certainly not to a case like the present. If the plaintiff's intestate had not died of his injuries, his action for the wrong would have been strictly and technically assault and battery. In such an action, a plea that the plaintiff was guilty of concurring negligence or fault would have been without precedent, as well as illogical and absurd. To such a cause of suit, the defendant must find and plead a complete justification of his conduct, or he must fail and pay the damages. At the common law, the cause of action was lost if the injured person died; but under the statute, it survives to the administrator, and is governed in this respect, at least, by the same rules of law. The case is therefore to be stated thus: The defendants, by their servant, were guilty of a personal and intentional assault upon the intestate. That assault, as we think, was not in law justified by the facts, and they are consequently without a legal defense.

Entertaining as we do this view of the case, it becomes unnecessary to examine in detail the charge of the judge at the trial. It was quite as favorable to the defendants in all respects as the law of the case would justify. A single point may be noticed: the judge was desired to charge that if the conductor, in the execution of the defendant's directions to remove any one from the cars who declined to pay fare, used unnecessary force, and wantonly injured the deceased, the defendant is not liable for such excess. This instruction was refused. The request, of course, assumed that the conductor's assault was justified by his instructions and by the circumstances; by his instructions so as to render his principals liable if he would be, and by the circumstances so as to exonerate them both. This being assumed, the point of the request was that he alone, and not his principals, was liable for any excess of force and violence. This may have been good law in the abstract. But it fails of application to the case, because the assault itself, as we have seen, was unjustifiable; and the defendants being liable for that as principals (which the proposition did not deny), they are also answerable for any circumstances of aggravation which attended the wrong. It may be added that the case does not disclose any special facts of this kind. The wrong consisted in ejecting the intestate from the car without a justification of that act.

The order granting a new trial must be reversed, and the judgment for the plaintiff on the verdict must be affirmed.

All the judges concurred.

Judgment affirmed.

EXPULSION OF PASSENGERS FROM RAILROAD TRAINS, POWER OF, AND WHEN AND WHERE MAY BE EXERCISED: See notes to *Commonwealth v. Power*, 41 Am. Dec. 476 et seq., and *Chicago etc. R. R. Co. v. Parks*, 68 Id. 562, 570, et seq. See also *O'Brien v. Boston etc. R. R. Co.*, 77 Id. 347, and note. A conductor has the right to remove passengers for refusal to pay fare, and may use force in so doing: *Shea v. Sixth Avenue R. R. Co.*, 5 Daly, 223; but it is unlawful to eject a passenger while the train is in rapid motion, rendering such ejection dangerous to life and limb: *Hughes v. N. Y. & N. H. R. R. Co.*, 4 Jones & S. 226; and the passenger may properly resist in such a case: *Rounds v. Delaware and L. W. R. R. Co.*, 64 N. Y. 138; and he may use the same resistance as he would in an attempt to take his life: *Jeffersonville R. R. Co. v. Swift*, 26 Ind. 476; self-preservation being his justifiable motive in such case: *English v. Delaware and H. Canal Co.*, 4 Hun, 684; S. C., 66 N. Y. 457, all citing the principal case.

EVEN TRESPASSER MAY COMPLAIN OF ACT CAUSING HIM INJURY, where it amounts to more than mere negligence, and is designed and intentional mischief: *Litchfield Coal Co. v. Taylor*, 81 Ill. 596; *Houghton v. Walce*, 64 Barb. 616, both citing the principal case.

MASTER IS LIABLE FOR INJURY DONE BY SERVANT, while acting within the scope of his authority, to a third person, where such injuries are the result of an abuse of the authority conferred, whether from error of judgment or mistake of facts, or from negligent and reckless performance of his duties: *Hamilton v. Third Avenue R. R. Co.*, 13 Abb. Pr., N. S., 322; S. C., 3 Jones & S. 128; S. C., 44 How. Pr. 207; *Mali v. Lord*, 39 N. Y. 384; *Higgins v. Waterliet T'p Co.*, 46 N. Y. 28; *Rounds v. Delaware, L. & W. R. R.*, 5 Thomp. & C. 480.

WHERE TRIAL HAS BEEN BY JURY, APPELLATE COURTS WILL NOT, in New York, review questions of fact, but if the order appealed from can be upheld on the existing facts as found, it will be affirmed: *Macy v. Wheeler*, 18 Abb. Pr. 75; S. C., 30 N. Y. 237; *Parker v. Jervis*, 3 Abb. App. Dec. 452; S. C., 34 How. Pr. 256; S. C., 3 Keyes, 273; *Terry v. Wheeler*, 25 N. Y. 424; *Henry v. Wilkes*, 37 Id. 564; *Dickinson v. Broadway and Seventh Avenue R. R.*, 47 N. Y. 509; *Hill v. Goode*, 18 Ind. 208, all citing the principal case.

DOWNING v. MARSHALL.

[23 NEW YORK, 366.]

UNDER DEVISE AND BEQUEST TO TESTATOR'S SON of real and personal property for life, and to his heirs in case he die leaving issue, or if he die without issue to the testator's nephews and nieces, if the son should die without issue before the testator, there would be no lapse, but the contingent limitation would take effect in favor of the nephews and nieces.

BEQUEST IN TRUST TO APPLY INCOME TO SON'S SUPPORT DURING LIFE, the principal to be paid to his issue, passes to other devisees and legatees, under a contingent limitation in their favor of all real and personal estate devised and bequeathed to the son, the testator having elsewhere in the

will referred to this fund as a part of the son's estate, though he had only a beneficial interest therein for life.

UNDER DEVISE OF LAND, ONE THIRD TO CHILDREN OF TESTATOR'S BROTHER A, in equal shares, and one third to the children of his brother B, the children of each class take the share belonging to their class as tenants in common.

UNDER DEVISE TO CLASS OF PERSONS, where, by reason of legal incapacity of the others, but one person of the class can take, he take all the estate which the devise, by its terms, gives to the whole class.

UNDER DEVISE TO CLASS OF PERSONS, where by reason of alienage none can take, the estate descends to the heirs of the testator, and not to the residuary of the devisees.

DEVISE IN TRUST TO RECEIVE AND APPLY RENTS AND PROFITS of real estate during the lives of two persons in being, and then to sell the property and dispose of the proceeds and income to certain corporations and unincorporated societies, for benevolent and religious purposes, will fail, as such, if the lives on which the trust is made to depend were those of persons having no interest in its performance, or who were not beneficiaries thereunder, though the trusts attempted to be created are valid as powers in trust, so far as the beneficiaries are competent to take by devise.

UNINCORPORATED ASSOCIATION IS INCAPABLE, AS SUCH, TO TAKE GIFT of real or personal property under a will for charitable purposes, where no trustees of the charity are directed or designated in the will.

CORPORATIONS CANNOT TAKE RENTS AND PROFITS OF LAND UNDER POWER created by will, unless expressly authorized by the legislature to take land or interests therein by devise, but they may take money or personal property by testamentary gift, though raised by conversion of land under a power in the will.

PROVISION IN CHARTER OF CORPORATION ENABLING IT TO TAKE LAND "by direct purchase, or otherwise," is an express authority to take land or interests therein by devise.

ACTION for purpose of testing validity and obtaining construction of several parts of a will.

Levi S. Chatfield, for the executors.

John H. Reynolds, for the Marshall Infirmary.

Marshall S. Bidwell, for the American Bible Society.

G. N. Titus, for the Tract Society.

John K. Porter, for the heirs and next of kin.

By Court, COMSTOCK, C. J. The testator, after directing his executors to pay his debts and funeral expenses out of any personal estate which might come to their hands, proceeded in the second clause of his will to devise and bequeath to his son, John Stanton Marshall, his dwelling-house and lot on Congress street, in Troy, together with his plate, household furniture, and wearing apparel, during the son's natural life, "and

in case he shall die leaving issue, the same shall go to his heirs." In the third clause, he bequeathed the Walcott bond and mortgage, a security amounting to nearly one hundred and fifty thousand dollars, as follows: One-third part to his executors, upon trust, to keep the same invested and apply the annual income to the support of the said John Stanton Marshall during life, and if he should die leaving lawful issue, then to pay the principal to such issue; one-third part to the children of the testator's brother James Marshall, in equal shares, and one-third part to the children of his brother Jeremiah Marshall; and in case any of the said children should die leaving issue, the share of the one so dying was to go to such issue. In the seventh clause, it was declared that if the said John Stanton Marshall should die without lawful issue, "all the real and personal estate above devised and bequeathed to him" was to go to the children of the said brothers James and Jeremiah, "to be divided and distributed amongst them in the same manner and proportions as directed in the bequest to them in article 3 above written." The only devise or bequest to the son John Stanton Marshall is contained in the said second and third clauses, and consequently this contingent limitation in favor of nephews and nieces refers to those clauses only.

The first questions arise upon these provisions of the will: John Stanton Marshall, the son, having died without issue in the life-time of the testator, it is claimed on the part of the benevolent institutions that the limitation over in favor of the children of James and Jeremiah, embracing the real and personal property mentioned in the second clause, failed with the primary gift to him and his issue in that clause contained. These institutions being provided for in the residuary clauses to be hereafter considered, they further claim that the property, both real and personal, which is the subject of the primary gift and of the limitation over, sinks into the residuum, instead of descending to the heirs or passing to the next of kin, as undisposed of. In the judgment appealed from, it is determined that a lapse was occasioned by the death of the son without issue; that consequently the devise and bequest over did not take effect; that so much of the property here spoken of as was personal passed under the residuary clauses, and that the real estate, being the residence on Congress street, descended equally to the two heirs at law, James E. Marshall and John W. Downing. These consequences might follow if it were true

that the substituted devise and bequest to the children of James and Jeremiah were intended to take effect only in the event of John Stanton Marshall dying without issue after the death of the testator. But we see no reason for imputing such an intention, nor are we aware of any rule which requires such a construction.

The substitution was to operate in the single event named—the death of the son without issue. The son and his issue were the primary objects of the testator's regard in these provisions of the will. If his bounty could not take that direction, he designed it for the children of the two brothers. Such being the general purpose, it was perfectly indifferent to him whether the ulterior limitation should take effect immediately on his own decease or at some indefinite time afterwards. He therefore declared, in plain words, that the brothers' children should have this property if his own son should die without issue, and he did not qualify that contingency by still another which might prove, and in fact would prove, fatal to his main purpose. There is no ground for supposing that his wishes, in regard to the ultimate disposition of the property, depended in the slightest degree on the time when the son should die without issue. Whenever that event should occur, the other objects of his bounty were substituted. If the doctrine of lapse had been more attentively examined, it would have been seen that it has nothing to do with the question. Testamentary gifts are liable to failure in consequence of the ambulatory nature of wills which cannot take effect in favor of persons who die before the testator, because, until then, such instruments can have no effect at all. The principle of the lapse is the same as that which defeats the operation of a deed in favor of a person who is dead at the time of its execution. And whether the instrument be a will or a deed, if the ancestor be dead, the heir cannot take in succession to him. The rule has been changed by our statute in the case, where the devise or bequest is to a child or descendant of the testator, who dies in his life-time, leaving a descendant who survives the testator. In such a case, the estate or interest given vests in the descendant of the legatee or devisee: 2 R. S., p. 66, sec. 52. But the principle, which at the common law occasioned, and still may occasion, the lapse of a legacy or devise, can have no application to substituted gifts. The primary gift may lapse or fail if its object dies before the will can operate at all, but this has no tendency to defeat an inde-

pendent and ulterior limitation to other objects who are living at the testator's death. In such cases, the question is not one of lapse, but of interpretation and intention, in regard to which, in the case before us, we think there is no room for doubt: 1 Jarman on Wills, 293; *Norris v. Beyea*, 13 N. Y. 273. We are of opinion, therefore, that on the death of the testator, the dwelling-house, plate, furniture, etc., mentioned in the second clause of the will, vested according to the seventh clause in the children of the brothers, James and Jeremiah, then living. The modification of this result, as to the real estate, by reason of the alienage of all those children except one, will be presently noticed.

Upon the same ground, a like conclusion must be adopted in regard to the one-third part of the Walcott mortgage, the income of which, according to the third clause, was to be applied to the support of the said John Stanton Marshall during his life, and the principal of which was to be paid to his issue, if he should leave any, provided the substituted limitation in favor of the brothers' children was intended to embrace this fund also. The subject of that limitation, as we have seen, was described as "the real and personal estate above devised and bequeathed to" the testator's son. The benevolent institutions and societies, as residuary legatees, insist that this description does not include the said one-third part of the Walton mortgage. But we think otherwise. Nothing but a life interest was given to the son in any of the property in question, whether mentioned in the second or third clauses. This is expressly so declared in both those clauses. If he died leaving issue, such issue were to take, not as his representatives, but directly from the testator as his devisees or legatees. It is manifest, therefore, that "the real and personal estate above devised and bequeathed," according to the descriptive words of the seventh clause, is the real and personal estate in which a life interest only was devised and bequeathed to the son; and the description thus understood is quite as applicable to the one third of the Walcott mortgage mentioned in the third clause as to the dwelling-house, plate, etc., mentioned in the second; unless, indeed, it be a distinguishing circumstance that the gift of the mortgage fund is in terms to the executors upon trust. But we think this is not a material circumstance. The gift was beneficially to the son, and notwithstanding the trust it constituted, in the view of the testator, the son's estate, and he described it in that manner in the ulterior limitation.

In another clause of the will (the eighth), there is an undoubted reference to this mortgage under the descriptive words, "the income of my said son's estate." Here we find the one-third part of the mortgage spoken of as the estate of the son. The testator's language was not accurate, but we entertain no doubt that he intended to give the principal of this fund to the children of the brothers on the death of his son without issue. This conclusion does not seem to have been questioned in the court below; but as already mentioned, on the ground of lapse, the fund was adjudged to belong to the residuary legatees. That there was no lapse, has been already shown.

There were at the death of the testator eight children of James Marshall, all of whom were aliens, except James E. The children of Jeremiah Marshall were six in number, and all of them aliens. The only kindred of the testator capable of inheriting real estate were the said James E. Marshall, and John W. Downing, the son of a deceased sister. It follows that of the two classes of children who were the objects of the devise and bequest in the seventh clause, only James E. Marshall could take by devise, and that the Congress-street house and lot, except the interest to which that clause entitled him, either descended to him and Downing equally as heirs at law, or else passed under the residuary clauses of the will. The question next to be considered is, whether James E. Marshall took by the devise only one eighth of one half, or one half, being the whole interest which the devise by its terms gave to the class of children to which he belonged. According to the decision made at the original hearing of the case, he took under the will only the smaller or fractional part. On the appeal in the supreme court, it was held, erroneously as we have seen, that the whole devise had lapsed.

I come to the conclusion with some hesitation that James E. Marshall took under the devise one half of this real estate. The limitation in its terms is to the children of the brothers James and Jeremiah, "to be divided and distributed amongst them in the same manner and proportions as directed of the bequest to them in article 3 above written." In the third article, as we have seen, there is a direct bequest of one third of the Walcott mortgage to the children of James, in equal shares, and a like gift of another third to the children of Jeremiah. These are the bequests referred to in the seventh clause as regulating the proportions in which the contingent devise and bequest of the house and other property was to vest in the two

classes of children. Each class was therefore to take one half, and the equality of the shares refers necessarily only to the divisions of interest amongst those embraced in either class. But of the children of James, one, and one only, could take according to the statute, which declares a devise to aliens void. Upon the point whether he is entitled to take all that was intended for him and his brothers and sisters, we have no key to the intention of the testator, because the testator assumed that all were equally competent, and he framed the devise accordingly. We must therefore ascertain, if possible, the rule of law to be applied to such a case.

Where a devise or bequest to two or more persons by name is in such form as to create a joint tenancy, and one of them dies before the testator, it is well settled that the whole interest vests in the survivors, and this result will take place if the gift fails as to one of the persons from any other cause than death: 1 Jarman on Wills, 295; *Humphrey v. Tayleur*, Amb. 136; *Larkins v. Larkins*, 3 Bos. & Pul. 16. It is equally clear that when the limitation creates a tenancy in common, the gift being to several persons by name, and not to them as a class, the same consequence will not follow from the death of one of them. In such a case, the share of the one dying before the testator, or before the time when it is to vest, is lapsed. In the present case, all the children of the brothers living at the death of the testator, and competent to take, would undoubtedly take as tenants in common. When an equality or inequality of shares is prescribed in express words, the language was always held to create such a relation. But the devise was not to the children by name, but to them as a class, and in such a case, although a tenancy in common may result, the same consequence does not follow as to the share of one of the class who has died, or for some other reason cannot take. Mr. Jarman says: "Where the devise or bequest embraces a fluctuating class of persons, who, by the rules of construction, are to be ascertained at the death of the testator, or at a subsequent period, the decease of any of such persons during the testator's life will occasion no *hiatus* or lapse in the disposition, even though the devisees or legatees are made tenants in common, since members of the class antecedently dying are not actual objects of the gift." "Thus," he adds, "if property be given simply to the children or to the brothers and sisters of A, equally to be divided between them, the entire subject of gift will vest in any one child, brother, or sister, or any larger

number of these objects surviving the testator, without regard to previous deaths:" 1 Jarman on Wills, 295, 296. In *Doe v. Sheffield*, 13 East, 526, there was a devise of land to the "sisters" of J. H., expressly, as tenants in common, and to their heirs and assigns forever. There had been three sisters of J. H., but only one was living at the death of the testator, or at the date of the will. It was held that she was entitled to the whole. So in *Viner v. Francis*, 2 Bro. C. C. 658, a legacy of two thousand pounds was given in equal shares to the "children" of a deceased sister of the testator, of whom there were three at the date of the will, but one died in his life-time. It was held that the two survivors were entitled to the whole sum: See also *Tatam v. Williams*, 3 Hare, 348. I do not find in the books the exact case where the gift was to a class of persons as tenants in common, some of whom were incapable of taking by reason of alienage. But such a case falls within the principle of those referred to. Whether the impossibility of taking is a natural one arising from the death of one or more of the devisees, or whether it flows from a legal incapacity, the result appears to me the same. In the example before us, the testator contemplated the objects of his bounty as a class, and not as individuals. The gift was to vest whenever his son should die without issue, and in fact, it vested as soon as the will took effect by the decease of the testator himself, the contingent event having previously occurred. We think that James E. Marshall then became entitled to the one half of the real estate in question, as the only competent representative of the class to which it was devised.

All the children of Jeremiah Marshall being aliens, none of them were competent to take the other half of the house and lot under the devise to them. On behalf of the Marshall Infirmary and the religious societies, it is claimed that this interest passed under the residuary clauses of the will. But we think otherwise. The statute declares that real estate so devised "shall descend to the heirs of the testator; if there be no heirs competent to take, it shall pass, under his will, to the residuary devisees therein named, if any there be, competent to take such interest:" 2 R. S., p. 57, sec. 4. This statute plainly leaves no room for a distinction in this respect between a void and a lapsed devise. According to some authorities, if the disposition was originally invalid, the residuary devisee takes the estate in opposition to the rule which prevails in case of a lapse. I think the distinction was never well

founded. It was rejected by the court of errors of this state, after the most elaborate consideration, in the case of *Van Kleeck v. Dutch Church*, 20 Wend. 457, where the devise was assumed to be void because made to a corporation. If void by reason of the alienage of the specific devisee, the statute, in plain terms, seems to repel any such distinction. One half of the real estate now in question, therefore, descended to the heirs, and the result is, that on the death of the testator, James E. Marshall became entitled to three fourths of the whole (one half by devise, and one fourth by descent), and John W. Downing to the remaining one fourth.

The most important questions in this case arise upon the residuary dispositions of the will. In the fourth clause, the testator devised and bequeathed to his executor "all the rest and residue of his real and personal estate whatsoever, and wheresoever situated," upon the trusts declared in the fifth and sixth articles. By the fifth article, he directed the executors to continue in operation the manufacturing establishments called the Ida Mills, in Troy, in such manner as they should deem best, during the natural lives of Joseph Marshall Coville, of New York City, and Joseph Marshall, of North Adams, Massachusetts, and of the survivor of them, or so long within their lives as, in the opinion of a majority of said executors, the same could be done without material injury to the interests of the estate, and of those participating in the income thereof, and to distribute and appropriate the net annual income or profits thereof, and also the net annual income of all other real and personal estate not otherwise disposed of by the will, as follows: One half in equal shares to the American Bible Society, the American Tract Society, and the American Home Missionary Society, and the other half to be expended in supporting and maintaining the Marshall Infirmary in the city of Troy for the support of poor and indigent sick and lame persons. In the sixth clause the executors were directed, on the death of the said Joseph Marshall Coville and Joseph Marshall, to convert into money, or otherwise dispose of, the real and personal estate so devised and bequeathed to them in trust, and to distribute and deliver over such moneys or estate to the several legatees for the objects named in the fifth clause, and in the same proportions as therein directed in respect to income. The property embraced in these clauses of the will was principally the Ida Mills.

I am clearly of opinion that a trust to receive the rents and

profits of real estate, and apply them to the use of the beneficiaries named, was marked out in these provisions. The mills were to be carried on by the executors, to whom, as trustees, the legal estate was expressly devised. It is true that the annual income of the business would be a complex result flowing from the use of the water-power, the machinery, and the mills; from the profit of capital, and the employment of labor. The material consideration is, that the use or profit of land would be one of the constituents in producing that result; and it might be the principal one. The executors were to have the possession of these establishments, and to operate them for the benefit of the institutions or societies which were the objects of the testator's benevolence. In this manner, the profit of land was to be received, and in combination with other elements it was to be paid over to the beneficiaries. In a trust to receive the rents and profits of real estate, it is not implied that the trustee must lease the estate, because that is not the only or the most usual mode of perception. As the owner of land may lease or occupy it, so in creating a trust he may provide for receiving the use or income in either of these modes.

But although trusts to receive and apply rents and profits may be created under the statute of uses and trusts, the one in question is not constituted in the manner which that statute prescribes. The application of rents and profits must be "to the use of any person during the life of such person, or for any shorter term:" 1 R. S., p. 728, sec. 55, subd. 3. The trust must, therefore, be made dependent on the life of the beneficiary. In this case, the beneficiaries are associations, incorporated or unincorporated; while the lives on which the trust depends are those of two natural persons having no interest in its performance. Such a limitation is plainly unsupported by any construction which we can give to the language of the statute. We are next to inquire whether, in the law of trusts and powers, there is any other mode of giving effect to the testator's intention. The law on this subject underwent a considerable change in our revision of 1830. But there has been, I think, some misapprehension as to the character and extent of that change. All express trusts were abolished except certain ones enumerated in the fifty-fifth section of the statute, which were: 1. To sell lands for the benefit of creditors; 2. To sell, mortgage, or lease lands for the benefit of legatees, etc.; 3. To receive the rents and profits of land, and apply them,

etc.; 4. To receive the rents and profits of lands, and accumulate the same, etc.: 1 R. S. p. 728. The impression has prevailed to some extent that these provisions of law have taken from owners the power of impressing upon their estates any limitations having the general characteristics of a trust, except such as are thus enumerated.

That this impression is not well founded will appear on a brief consideration of the subject. At the common law, fiduciary interests in land under the name of uses might be created without any restriction depending on the object or purpose of the trust. Limitations of this character were enforced upon the conscience of him who held the legal estate. Prior to the statute of uses, 27 Hen. VIII., these limitations were, perhaps, only known in their simplest and most elementary form; that is to say, in the form of legal estates held by one person for the benefit of another, without any active duty or trust. In this form, they were abrogated by that statute. This was done, not by defeating the feoffment or devise to such a use, but by vesting the legal estate in the beneficiary. After the statute, uses were revived under the name of trusts. By a strict construction of that enactment, passive trusts might still be created by limiting a use upon a use; it being held that the statute only executed the use in the first *cestui use*, who was allowed to hold the estate for the benefit of the second. This was doubtless an evasion of the letter and policy of the statute; but neither its letter nor policy stood in the way of creating active trusts; that is, legal estates impressed with some active duty in their control, management, or disposition for the benefit of some person or class of persons other than the trustee. Trusts of this kind grew up and expanded to meet the wants and wishes of mankind. They were undefined by any statute or rule. The reason, or occasion, for vesting the legal title in a trustee appears to have rested in the discretion of the author of the trust. Where the instrument did not in terms so vest the title, there was always a question whether the nature of the trust, or duty declared, was such as to render the presence also of the legal estate necessary or convenient. If so, the title was deemed to vest in the trustee accordingly. If not, then it remained in the donor or his heirs, subject to the trust as a power. Powers were no less undefined than trusts. The intention as to the legal estate being unexpressed, powers began where trusts terminated. But to ascertain the dividing line between them was often

attended with difficulty, and perplexing questions frequently arose: *Brewster v. Striker*, 2 N. Y. 19.

Such was the state of the law at the time of our revision of 1830. We had enacted the English statute of uses at an early day, but had made no other change in jurisprudence on this subject. The system of trusts was a complicated one, and was believed to be attended with great inconveniences. These it was proposed to remedy, not by depriving men of the power of disposing of their estates, nor even by abridging that power, but by giving effect to such dispositions according to a more simple classification, so as to relieve this branch of the law from much useless refinement and perplexity. Trust estates of a character purely passive, which might exist in various forms, notwithstanding the statute of uses, were justly considered wholly unnecessary. These were accordingly abrogated; but this was not done by defeating such limitations entirely. On the contrary, the policy of the former statute was enlarged by new and appropriate provisions, which vested the title in the beneficiary: 1 R. S., p. 727, secs. 47, 49. The utility of active trusts was not questioned. But these were believed to be capable of great abridgment, and of a precise and accurate definition; and they were defined in the fifty-fifth section above mentioned. All other express trusts were abolished (sec. 45), by which the revisers and the legislature intended simply that legal estates impressed with trust duties and powers should be created only in the cases specified. The provisions of the statute were aimed against the attempt to create such estates or titles, but not against the duty, trust, or power. This is perfectly manifest, from the provision which declares that if an express trust be created for any purpose not enumerated, no estate vests in the trustee, but if the trust authorizes the performance of any act lawful under a power, it shall be valid as a power in trust (sec. 58). There was, very wisely, no attempt to enumerate or define the acts which might be lawfully done under a power, and in that respect, therefore, the law was subjected to no innovation. The result is, that express trusts, using that term in the strict technical sense as descriptive of legal titles, vested in a trustee for the fiduciary purposes declared in the instrument, were abridged and confined to the enumerated classes. But the trust limitation, although not belonging to that class, if not otherwise unlawful, will be effectuated in a different mode. If of a passive character, the use is executed by vesting the title in the beneficiary. If

active, it takes effect as a power in trust, leaving the title in the donor or his heirs, subject to the power. And thus, as the old statute of uses, which was intended to abolish passive trusts, left the widest field for the creation of active ones, so our revision, in abrogating all active trusts, except the few particularly specified, has reanimated them under the name of powers, which are left without restriction, provided the purpose of the limitation or power be in itself a lawful one. The statute, it is true, enunciates a code on the subject of powers also, but it makes no attempt to enumerate or define the lawful occasion for creating a power.

Referring now to the residuary devise in question, we have seen that it does not belong to the class of active trusts permitted by the statute. It is also clear that the statute does not execute the uses intended by vesting the legal title in the beneficiaries. This is clear because the trusts impressed by the will upon the estate devised to the executors are of the most active description, requiring them to take the possession and management of the property into their own hands. The limitation must, therefore, take effect as a power in trust or be defeated altogether. To giving that effect to it, there is no objection, if the beneficiaries are competent to take, and if the acts prescribed to be done are lawful in themselves. It needs no argument to prove that it is lawful for the owner of land to devote the rents and profits to the use of any beneficiary, under no incapacity to receive them by any instrument to take effect during his life, or by his last will, provided the limitation does not violate the rule as to the alienability of estates. It is equally clear, in this case, that nothing more than a power was vitally necessary to carry on the testator's manufacturing establishments, and to apply the net income in the manner he prescribed. That the presence of the legal title would be highly convenient for these purposes, may be admitted; and it may also be admitted that the revisers committed a grave error in attempting to define all the proper occasions for creating a trust estate. The rule against perpetuities was not violated by this devise; because it did not attempt to suspend the power of alienation beyond two lives in being, at the death of the testator: 1 R. S., p. 723, secs. 14, 15. It is plain, also, that the ultimate trust to sell and distribute the proceeds contemplated an act lawful in itself, but which did not require the presence of the legal estate in the trustees.

It follows from these views that the residuary dispositions of this will failed to vest in the trustees the legal title of the real estate embraced in them; in other words, failed to create a technical trust as the testator intended. But it also follows that those dispositions were valid as powers in trust, so far as we have yet examined the question. The difficulties which remain to be considered arise out of the alleged incapacity of the beneficiaries in whose favor it was intended to create the trust. The American Home Missionary Society was an unincorporated association having a regular organization, its object being the spread of the gospel in this country. The American Bible Society was incorporated by act of the legislature in the year 1841, for the purpose of promoting the circulation of the holy scriptures. The second section of the charter declares that the net income of the society arising from its real estate shall not exceed the sum of five thousand dollars annually. The third section declares that the corporation shall possess the general powers and be subject to the provisions of the third title of chapter 18, part 1, of the revised statutes, so far as the same are applicable and have not been repealed: Laws of 1841, p. 41. The American Tract Society was incorporated in the same year. The income of its real estate was restricted to ten thousand dollars, and the charter contains a like reference to the revised statutes: Statutes, p. 249. In those statutes, the general powers of all corporations are defined, and among them is the one "to hold, purchase, and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter: 1 R. S. 599, sec. 1, subd. 4. In regard to these two societies, it is not claimed that the devise now in question, if upheld, will carry their real estate or the income therefrom to an amount exceeding the limits prescribed in their respective charters. The Marshall Infirmary was incorporated in the year 1851, and was declared "capable of taking by direct purchase or otherwise, holding, conveying, or otherwise disposing of any real or personal estate" for the purposes of the corporation, so that the net annual income should not at any time exceed twenty thousand dollars: Laws of 1851, p. 537. It is conceded that the provision made by this testator will not carry the amount beyond the prescribed sum. The claims of these beneficiaries are now to be considered with reference to the character and capacity of each.

And, first, we think that the residuary devise and bequest

were void as to the unincorporated Home Missionary Society. That society is composed of a fluctuating and unascertained class of persons, having no legal capacity to take the gift. The beneficiaries are the entire community within the influence of the society. There is no trustee competent to take the fund so as to secure its appropriation to the benevolent purpose intended. That such a gift is void according to legal rules, it needs no argument to prove. There is no trustee, and there are no beneficiaries ascertained, either as individuals or as a class of persons. These objections are fatal. It is said that a trust shall never fail for want of a trustee, because a court of equity will supply the defect. But this is true only of a valid trust, and in order to be valid, it must be so constituted that a title can vest in some person, natural or artificial, by force of the gift itself. The principles on which this question depends have heretofore been fully examined by this court. A charitable donation, precise and definite in its purpose, void at law because the beneficiaries are unascertained, may be maintained if there be a competent trustee to take the fund and effectuate the charity. If there be no such trustee, it fails, and the heir or next of kin is entitled: *Williams v. Williams*, 8 N. Y. 525; *Owens v. Missionary Society*, 14 Id. 380 [67 Am. Dec. 160]; *Beekman v. Bonsor*, 23 Id. 298 [*ante*, p. 269]. It is true in the present case, that according to the dispositions made by the testator, the executors were appointed the devisees and legatees in trust; but they were not constituted trustees of the charity. The objects of the charity were mankind in general, or that portion of mankind within the sphere of the missionary labor carried on by the society. It had no trustees except the unincorporated persons forming the society itself. The duty of the executors would be fully performed by paying over the income, and ultimately the principal, of the fund, to any agent of those persons. Those persons were a fluctuating body unknown to the law, irresponsible to the courts, and incapable of receiving a gift even for a purpose which the law may denominate charitable.

The claims of the Bible and Tract societies may be considered together, because they are each incorporated with powers entirely similar. Their charters, by limiting the amount of income to be derived from real estate, imply that real estate may be taken and held by them, but being silent as to the mode of acquisition, the general statute in regard to corporations, which has been mentioned, must be referred to as

the source of power in this respect. By the terms of that statute, as we have seen, corporations are authorized "to hold, purchase, and convey" real and personal estate not exceeding, etc. This statute, by itself, contains no prohibition in respect to the manner of acquiring the real estate which corporations may hold, while on the other hand, it confers no express authority to take by devise. But the same legislature which enacted this statute also enacted the existing statute of wills, by which it is declared that "no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter, or by statute, to take by devise:" 2 R. S., p. 57, sec. 3. Effect must be given to both these enactments, and the conclusion is plain that the general authority which all corporations possess to take and hold real estate does not include power or capacity to take by will. Indeed, the English statute of wills passed in the reign of Henry VIII., which was an enabling act, and was re-enacted at an early day in this state, contained an exception of bodies politic and corporate. It requires no further argument to show that these two societies could not acquire real estate in this manner.

The question remains, however, whether the residuary clauses of the will, so far as intended to benefit these two corporations, were so framed as to fall within the prohibition against devising to such bodies. As we have seen, the intention of the testator was to create a trust under which these societies were to share in the profits and income of real estate during two lives, and then the same real estate was to be converted into money, and they were to share in the distribution. By a legal necessity, as we have also seen, the trust can be maintained only as a power. The inquiries now are: 1. Whether the statute of wills prohibits these two corporations from sharing in the use and profit of the land during the two lives mentioned in the devise; and 2. Whether they will be entitled to share in the proceeds of the land when the time shall arrive for converting it into money as the will directs.

In the case of *McCartee v. Orphan Asylum Society*, 9 Cow. 437 [18 Am. Dec. 516], it was held by Chancellor Jones that a devise of real estate to executors in trust for a charitable corporation was valid, notwithstanding the exception in the statute of wills then in force. This conclusion was maintained in an opinion of great learning, but much too extended to admit of a particular review. The general course of reasoning was, however, as follows: The English statutes of mort-

main, in force from an early period in the history of that country, prohibited the acquisition of land by corporations, and this prohibition was extended to uses by a statute passed in the reign of Richard II. Prior to that time, the ecclesiastics had evaded the mortmain acts by procuring lands to be conveyed to natural persons for the use of religious houses or bodies, and the clerical chancellors had enforced the use. The statute of 15 Rich. II., c. 5, was enacted to prevent this evasion. According to the principles of feudal law, lands could not be devised at all; but as uses were considered separate from the land upon which they were impressed, a person entitled to a use could, before the statute of Richard II., devise it to an individual or a corporation. The statute of wills (34 Hen. VIII., c. 5) contained an exception as to bodies politic and corporate; but this exception was to prevent an implied repeal of the mortmain acts. Without that exception, the general power of devising would include devises to corporations. In this state, all the mortmain acts were repealed, and the statute of wills was re-enacted with the same exception. But the exception was not with us, as in England, auxiliary to a mortmain system of law and policy. Our statute of wills, therefore, simply failed to confer on devisors a capacity of devising to a corporation; and it was consistent with legal principles to overcome that difficulty by allowing corporations to take from a third person to whom lands might be devised in trust. All the statutes of mortmain, including those which related to uses, being repealed, a use could be devised, as at the common law, without the enabling statute of wills. That statute was only required to render legal estates devisable; and the exception, therefore, only applied to such estates. It created merely a technical difficulty, founded in no policy, which might be obviated by any technical contrivance. Thus a wife cannot convey to her husband, but she can to a third person, from whom the husband can receive the use or the title. So the owner of lands could not devise them to a corporation, but he could to a natural person in trust for a corporation. Even if these views were untenable, and a devise in trust should be held as embraced within the exception to our statute of wills, then the learned chancellor thought that, where the trust was for a charity, it was maintainable, notwithstanding that statute. I have given the substance of the reasoning by which the conclusion was maintained, in few words, and in the best manner I am able.

The court of errors reversed the decree of the chancellor, on the ground that the devise was direct to the corporation, and not in trust. It was a gift to a charity of the very highest merit, and the court of last resort, therefore, necessarily determined that the doctrine of charitable uses could not be invoked to maintain a gift to a corporation void at law, because not permitted to be made by the statute of wills. On this point, decisions the other way can be found in England, founded on the idea that the statute of charitable uses (43 Elizabeth) created in favor of charities an exception to the mortmain acts, and modified the exception in the statute of wills: 4 Kent's Com. 507, and note. But the statute of 43 Elizabeth was never in force in this state; and it was, moreover, repealed at an early day. It is plain, therefore, that a devise to a charitable purpose cannot be sustained, if made to a corporation in violation of the statute of wills.

The decision of the court of errors left untouched the question whether a devise in trust for a corporation was valid. The views of Chancellor Jones on that point were neither affirmed nor disaffirmed. Without fully accepting them myself, I do not propose to criticise them. Very soon after the decision of the chancellor in that case, the existing statute of wills was proposed and adopted in the legislature as part of the revised statutes of the state. The senate was the same body which participated in the determination of the case in the court of errors. In place of an exception which, as had been contended, simply withheld capacity to devise in favor of a corporation, a broader enactment was substituted, intended to prohibit such devises. The statute was so framed as to declare that all persons except idiots, etc., may devise their real estate; that every estate and interest descendible to heirs may be so devised; that such devise may be made to any person capable by law of holding real estate; but it was added that "no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter, or by statute, to take by devise." In this form, the statute was designed to be prohibitory, and to leave no room for the subtleties and refinements which had obscured the subject. The language is so broad as to include every interest which is capable of being devised. Uses and trusts, not less than legal estates, fall under the prohibition. The enactment is, moreover, founded in a just policy, which ought to be faithfully maintained. It is said we have no mortmain policy or statutes. But this is

not so. The exception in the former statute of wills was with us intended to prevent devises of real estate from being made to corporate bodies, where it would be locked up in perpetuity; and also to prevent languishing and dying persons from being imposed upon by false notions of duty prompting them to disregard the claims of family and kindred.

The positive statute we now have is still more distinctly founded in that policy, and it was enacted to solve the doubts which great learning and ingenuity had suggested. It is a statute of mortmain resting on a mortmain policy, as distinctly as any act of the British parliament. The condition of society and the freedom of religious opinion in this country have rendered the necessity of still greater restrictions on the power of acquiring real estate by corporations less apparent than formerly in England. But the necessity is recognized of forbidding the acquisition by will, unless the legislature in granting the charter, and in full view of the reasons for so doing, think proper to confer the power in express terms. The legislative grant of the power is the equivalent to the license from the crown, which, according to an act of parliament, might dispense with the mortmain statutes in Great Britain. Nor is this necessity by any means a fanciful one. It is eminently praiseworthy to give in the interests of charity and religion. But in the last hours of life, exaggerated impressions of charitable or religious duty often obscure the judgments of men, and subject them to undue influence and persuasion. Against these the statute is intended to guard, because it is in behalf of associations incorporated for pious and benevolent purposes that the sentiments of men in such situations are most generally appealed to. The enactment is therefore prohibitory, and it ought to be expounded and applied in that sense. The learned revisers, in reporting it to the legislature, observed in the accompanying note: "It has been put in the form of a positive prohibition, with the view of calling the attention of the legislature to it, that it may be retained if it is intended to be prohibitory, or may be expunged if deemed unnecessary. It is a question now agitated in our courts, whether it is to be considered as a prohibition, or not." The legislature adopted the section without alteration, and we are consequently left in no doubt as to its spirit and policy.

I entertain, therefore, a decided opinion that the residuary devise in question cannot be sustained for the benefit of the Bible and Tract societies, so far as it relates to the use and

profit of the land during the two specified lives. It can make no difference that, in consequence of the invalidity of the trust, it could take effect only as a power, even if the beneficiaries were authorized to take by devise. The result of the disposition is the same, whether we call it a trust or a power. In either mode of sustaining the devise, the rent and profit of land is the thing given; and as no interest in land can be lawfully devised to a corporation, the technical character of the limitation is immaterial. That which the law forbids to be done at all cannot be accomplished by a merely formal change in the mode of arriving at the result.

Upon the question whether the ultimate direction to sell the real estate in question, and pay over the proceeds at the expiration of the two lives mentioned, is valid as to the Tract and Bible societies, the views of the court will be expressed by Judge Denio. This point has appeared to me involved in some doubt, but I do not dissent from his conclusion, which is in favor of the validity of that direction.

We are next to determine the rights of the Marshall Infirmary. That institution, we think, is expressly authorized by its charter to take by devise. As we have seen, the power given is to take "by direct purchase, or otherwise." The word "purchase" must be taken to have been used in its popular sense, and not to include acquisition by will. This was held in the case of *McCartee v. Orphan Asylum*, 9 Cow. 437 [18 Am. Dec. 516], where the authority was to take by purchase merely. In this sense, the term is used in the general statute before cited, defining the powers of corporations, and in all special charters granted by the legislature, where it is not intended to confer the power of taking by will. But in the charter of the institution now in question, an additional term was used, broad enough to include every mode of acquiring real estate. According to the statute of wills, the authority to take by devise must be express. But this only means that corporations, as such, cannot take in that manner, as they can by purchase, for the purposes of their organization. In giving express authority to take and hold by devise, that term is not necessary to be used. In all language that is expressed which the words, fairly interpreted, mean. When the legislature, in granting this charter, said that real estate might be acquired by purchase or otherwise, I see no reason to doubt that all the modes known to the law were intended. If we hold this not to be so, then we must say that the additional word, inserted

apparently with care and contrary to the general course of legislation, is destitute of all meaning. The charter would exclude even capacity to take by gift, whether made by will or deed; because "purchase," in the popular sense, implies an exchange for value. It is not to be supposed that the legislature would charter such an institution with such a restriction. The testator himself appears to have been the founder of this charity. It was undoubtedly the cherished object of his care. Its purposes are, in the highest degree, meritorious; and I am unwilling to place upon its powers a technical and narrow construction which the language of its charter does not demand, and which would entirely defeat the liberal endowment he designed for it.

Other questions of minor importance were suggested on the argument. One of these relates to the compensation of the executors, it being supposed that some part of the duties assigned to them, respectively, has been abrogated by the failure of material portions of the will. Another relates to the fund out of which the remaining debts of the testator ought to be paid. These matters have not been passed upon, or considered in the courts below, and we have, therefore, nothing to review in respect to them. Nor are we satisfied that all the facts for a proper judgment upon them are now before us. A final decree in the case should embrace the entire controversy, and we therefore think it inexpedient to pronounce one in this court. Another hearing can be had in the special term of the supreme court, when the main questions will be regarded as disposed of by the decision we make, and a final judgment will be rendered upon all the points which may arise. We therefore reverse the judgments of the general and special terms, adopting the conclusions indicated in this opinion. Those conclusions are as follows: 1. The contingent devise and bequest contained in the seventh article of the will, in favor of the children of the brothers James and Jeremiah, did not lapse, or fail, by reason of the death of the son, John Stanton Marshall, without issue, in the life-time of the testator. 2. That devise and bequest embrace not only the real and personal property mentioned in the second article, but also the one-third part of the Walcott mortgage mentioned in the third, of which the income was therein given to the said John Stanton Marshall during life, and the principal to his issue, if he should have any. 3. Upon the decease of the testator, the undivided half of the dwelling-house and lot mentioned in the

second article vested, according to the seventh article, in James E. Marshall, the only child of James Marshall, who was not an alien; and the other half did not go into the residuum, but descended equally to the heirs at law, James E. Marshall and John W. Downing, all the children of the brother Jeremiah being aliens. In this connection, we have considered the question whether John W. Downing has any possessory right to the said house under the eighth article of the will, and we think, in accordance with the decision of the court below, that he has not any such right. 4. The personal estate mentioned in the second article, and the said one third of the Walcott mortgage mentioned in the third, on the death of the testator vested, according to said seventh article, in the children of James Marshall and Jeremiah Marshall, then living; that is to say, one half in each family of children, as a class, such children sharing equally with each other. 5. The residuary devise and bequest failed as a trust in respect to the real estate therein embraced; that is to say, the title to such real estate did not vest in the executors as trustees. But the trusts attempted to be created are valid as powers in trust, so far as the parties intended to be benefited thereby are competent to take by devise. 6. The Home Missionary Society, being an unincorporated association, is incompetent to take either real or personal estate, and the residuary clauses of the will are so far wholly void. 7. The American Tract Society and the American Bible Society, being corporations without power to take real estate by will, the residuary devise is void as to them, so far as it relates to the rents and profits of the land, or net annual income to arise from carrying on the Ida Mills, as the testator directed. 8. But those societies will be entitled to share in the proceeds of the sale and conversion of the said mills and real estate, to be ultimately made, as the will directs. The trusts in their favor are also valid as to any personal estate embraced therein. 9. The Marshall Infirmary is authorized to take by devise, and the trusts to receive and pay over the rents and profits, or net annual income to arise as aforesaid, as well as the trust to sell and pay over the proceeds, are so far valid as powers in trust. 10. All the real estate mentioned in the residuary clauses of the will descended to the testator's heirs, subject to the trusts declared in said clauses as powers in trust, so far as the same are now adjudged to be valid. The Marshall Infirmary is entitled to one half the rents and profits, or net annual income, from the death of the testa-

tor. The other half belongs to his heirs at law. Such real estate will be ultimately sold, as the will directs. The Marshall Infirmary will be entitled to one half the proceeds of such sale. The American Bible and the American Tract societies will be entitled each to one sixth, and one sixth will go to the testator's heirs.

The judgment must be reversed, and a new hearing must be had in the supreme court, with costs of suit, including this appeal, to abide the final direction of that court.

DENIO, J. It is contended that the direction to sell the residue of the estate and pay the proceeds to the societies is void (except as regards the Marshall Infirmary), on the sole ground that it is forbidden by the statute making void devises to corporations, in these words: "But no devise to a corporation shall be valid, unless such corporation be expressly authorized," etc.: 2 R. S., p. 57, sec. 3. I think the statute does not affect the case.

I. According to the earlier part of the opinion of the chief judge (in which I concur), it is shown that there is no devise of the land to any one. There is only a power. Although we concede that so much of the power as relates to the rents and profits is void, there still remains a distinct authority to sell the land and pay over the proceeds. A power to a trustee (unaccompanied with an estate) to sell lands and pay the proceeds to a given person or institution is not, in any legal or popular sense, a devise to such person or institution. There is not, therefore, in the case, any devise to a corporation, and for that reason the statute has no application.

II. If it could be maintained that there was an interest of any kind devised or bequeathed to the corporations, it is not land or real estate. The direction to sell is a conversion into personal property. I think there is no authority for saying that, under such a direction, the corporations could claim the land.

III. The cases under the statute of 9 Geo. II., c. 36, sec. 1, commonly, but improperly, called the mortmain act, are not applicable.

1. That statute has not been re-enacted in this state. Though adopted in England before the revolution, and the question as to its incorporation into our system being before the legislature when the general English statutes were re-enacted, it was not embraced among the laws retained. Its special policy was not approved. It may rather be said to have been condemned.

2. It is not *in pari materia* with our statute above mentioned, availing devises to corporations. The two statutes were not passed in furtherance of the same or a kindred policy, for the apparent motives for the two enactments are quite different. 1. The English act does not forbid devises to corporations any more than to natural persons. The provisions are aimed against charities, and not against corporations. Every disposition to a corporation which would be good if made to a natural person is valid, though made to a corporation. 2. Our act has no reference to charities, but only to corporations.

3. The cases under the act of George II., to which reference is made by the respondent's counsel, proceed upon the peculiar provisions of that act. It not only makes void the alienation of land for the benefit of charitable uses (to any person), but forbids land from being in any way charged or incumbered. Under such an enactment, it has been very properly held that lands could not be devised to be sold for the benefit of a charity. Such a devise would effectually charge the land, and would be within the express words of the statute. It was remarked by the lord chancellor, in *Attorney-General v. Lord Weymouth*, Amb. 20, that it was of no consequence, under the mortmain act, whether the gift was of land or money arising out of the sale of land; for, said he, "it is just the same thing—the statute making void all charges and incumbrances on land for the benefit of a charity."

IV. The distinction between a devise of land and a power to sell for the benefit of another, in respect to the capacity of the donee to take, is well settled by authority. The cases of *Craig v. Leslie*, 3 Wheat. 563, and *Anstice v. Brown*, 6 Paige, 448, hold that where land is devised or conveyed to be sold, and the proceeds paid to an alien, the trust is perfectly valid. It is true that when these cases arose, a devise or conveyance to an alien was not absolutely void, as devises now are. But I think this makes no difference; the reasoning of the judges in the cases proceeding upon the effect of an equitable conversion, and upon the consideration that the policy of the law which forbids aliens from holding was not infringed upon by bequeathing money to them to be raised by the sale of land pursuant to a power. So in the present case. The policy and the language of the statute prohibits corporations from holding land by the title of devise; but they are free to take money or personal property by a testamentary gift. To me it seems

perfectly consistent with the policy, as it certainly is with the language of the statute, to hold that a testator may, by will, create a power to dispose of his land and pay the proceeds to a legatee.

I am in favor of a judgment which shall establish the principle I have stated, that is to say, which shall uphold the power as regards the two incorporated societies which are not authorized to take by devise.

SELDEN, LOTT, JAMES, MASON, and HOYT, JJ., concurred, except that LOTT, HOYT, and JAMES, JJ., expressed no opinion upon the question as to the share of the heirs of the testator in the proceeds of the sale of the real estate mentioned in the residuary clause.

DAVIES, J., who also delivered an elaborate opinion, dissented from the preceding in respect to the validity of the power in trust for the benefit of the charitable corporations, and as to the authority of the Marshall Infirmary to take by devise.

Judgment reversed.

ONLY SUCH TRUSTS ARE VALID IN NEW YORK as are expressly authorized by statute: *Fellows v. Heermans*, 4 Lans. 251; and other trusts created by will are void: *Leonard v. Bell*, 1 Thomp. & C. 609. The express trusts retained in New York are active trusts for special temporary purposes in the interest of individuals: *Ruth v. Oberbrunner*, 40 Wis. 263. Charitable trusts are not excepted from the operation of the statute abolishing all uses and trusts except those expressly authorized: *Clemens v. Clemens*, 37 N. Y. 76. The statute abolishing active trusts in New York is said to have reanimated them under the name of powers, which are valid, provided the purpose be itself a legal one: *McGrath v. Van Stavoren*, 8 Daly, 460; *Gano v. McCune*, 56 How. 342; *Garvey v. McDevitt*, 11 Hun, 460. All of the above cite the principal case.

LAPSED LEGACIES, GENERALLY: See note to *Morton v. Barrett*, 39 Am. Dec. 582. Devise to son for life, and to his heirs if he die leaving issue, or if he die without issue, to another, will not lapse if the son should die without issue before the testator, but the contingent limitation would take effect: *McLean v. Freeman*, 9 Hun, 250; S. C., 70 N. Y. 85; *Manice v. Manice*, 1 Lans. 373, all citing the principal case.

GIFT BY WILL DESIGNATING NO DONEES OF LEGAL OR EQUITABLE TITLE is void: *Bascom v. Albertson*, 34 N. Y. 590. To accomplish purpose of will disposing of rents and profits, the legal title should be in the trustees: *Betts v. Betts*, 4 Abb. N. C. 385; and if under the New York statute the immediate title and whole beneficial use of the land is given directly to the cestui que trust, the trustee being made the mere depository of the naked title, then the whole title will vest in the beneficiary: *N. Y. Dry Dock Co. v. Stillman*, 30 N. Y. 134; and the trustee cannot take the rents and profits: *McKinstry v. Sanders*, 2 Thomp. & C. 192; *Blanchard v. Blanchard*, 6 Id. 554, all citing the principal case.

TRUST WILL BE HELD VOID, WHERE IT IS SO VAGUE that neither the object nor the beneficiaries can be ascertained: *Power v. Cassidy*, 54 How. 6; S. C., 16 Hun, 297. A trust depending on the life of one not a beneficiary nor interested in the performance thereof is void: *Thompson v. Thompson*, 50 How. Pr. 511. So trusts indefinitely suspending the power of alienation are void, and likewise, where they have for their object the vesting of a bequest in an alien or one otherwise incompetent to take: *Bascom v. Albertson*, 34 N. Y. 590, 593, 594; *Quin v. Skinner*, 49 Barb. 135; S. C., 23 How. Pr. 236; *Hall v. Hall*, 81 N. Y. 138, all citing the principal case.

TRUST IN WILL FOR PURPOSE OF SALE ONLY, is valid as a power, and passes the estate to persons entitled subject to the execution of the trust as provided: *Janssen v. Wemple*, 3 Redf. 233; *Crittenden v. Fairchild*, 41 N. Y. 292, 293, citing the principal case.

CY PRES POWER DOES NOT EXIST IN NEW YORK: *Bascom v. Albertson*, 34 N. Y. 590, citing the principal case.

DEVISES TO CLASS OF PERSONS, GENERALLY: See *Lookerman v. Blair*, 46 Am. Dec. 667, note.

PART OF RESIDUE GIVEN BY WILL, DISPOSITION OF WHICH FAILS, will not accrue in augmentation of the remaining parts as a residue of a residue, but instead, devolves on the heirs as undisposed of: *Betts v. Betts*, 4 Abb. N. C. 421; *White v. Howard*, 52 Barb. 307; *Kerr v. Dougherty*, 59 How. Pr. 66; S. C., 79 N. Y. 346; *Manice v. Manice*, 43 Id. 363; *Strang v. Strang*, 4 Redf. 378, all citing the principal case.

DEVISES TO CORPORATIONS, GENERALLY: See *McCartee v. Orphan Asylum*, 18 Am. Dec. 541, note. Devise to corporation not expressly authorized to take and hold real estate is void in New York: *Starkweather v. American Bible Soc.*, 72 Ill. 53. Corporations may, however, take money by testamentary gift, and this though it was raised by conversion of real property under direction in the will: *Sherwood v. American Bible Soc.*, 4 Abb. App. Dec. 231; S. C., 1 Keyes, 545; *Harris v. Slight*, 46 Barb. 504; *Draper v. President etc. Harvard*, 57 How. 273, all citing the principal case.

CHARITABLE USES, GENERALLY: See *Owens v. Missionary Soc.*, 67 Am. Dec. 184, note. Charities void for uncertainty: See note to *Bridges v. Pleasants*, 44 Id. 98. The law of charitable uses as existing in England does not exist in New York: *Levy v. Levy*, 33 N. Y. 121. Bequests to unincorporated societies for charitable or religious purposes are void, as such societies cannot take by bequest, and the subsequent incorporation of such a society will not render the bequest valid: *McKeon v. Kearney*, 57 How. Pr. 353; *First Presb. Soc. v. Bowen*, 21 Hun, 390; *In re Roman Cath. Soc. of Newport*, 4 Lans. 16; *Burrill v. Boardman*, 43 N. Y. 360; *Lutheran Ref. Church v. Mook*, 4 Redf. 515. Bequest of residue of estate "to be distributed to the poor of St. Peter's church" held void in *Flanagan v. Flanagan*, 8 Abb. N. C. 415. But a devise to a competent trustee for an unincorporated charitable institution, and to be expended for or applied to some definite purpose, is held to be good: *Harris v. American Bible Soc.*, 2 Abb. App. Dec. 321; S. C., 4 Abb. Pr., N. S., 426; *In re Trustees N. Y. Prot. Epis. Pub. School*, 31 N. Y. 589. Trustees' costs are not allowed in actions for construction of wills or charities to persons other than trustees, taxable costs being allowed, and no more: *Rose v. Rose*, 28 Id. 190. But full allowance will be made to trustees for necessary expenses, including counsel fees: *Wetmore v. Parker*, 56 Id. 466. All the above cases cite the principal case.

The mortgage upon its face acknowledged an indebtedness from the mortgagor to the mortgagee of six hundred and eighty dollars and twenty-five cents, and was given to secure the payment of that amount, with interest, on the fifteenth of March, 1856, and was duly filed on the day it was executed. Immediately after it became due, the mortgagee took measures to sell the property at public auction to pay the debt; at the sale, Lawrence became the purchaser, paid a small portion of the purchase-money, sufficient to pay the charges of the auctioneer, and gave his note for the balance to the mortgagee. He was therefore a purchaser for value. The mortgagor was present at the sale, and it does not appear that he made any objections thereto or set up any claim that the mortgage was invalid. Up to this time, the creditor, at whose instance the property was afterwards seized, had no judgment against the mortgagor, and did not obtain one until some six months thereafter. He therefore had no lien upon the property in question when Lawrence purchased. The purchase by Lawrence, therefore, was valid, as between him and the mortgagor, and vested the title of the property in him, subject only to be impeached by the creditors of Allen, as having been made with intent to defraud them. Up to this time, the failure to take possession of the property could not be impeached by this creditor, as he had no judgment or execution to enable him to attack the validity of the mortgage. If Lawrence had then taken and continued in the actual possession of the property up to the time of the levy thereon, his title could not, as a question of law, have been defeated, simply by proving the judgment, execution, and levy, and that the mortgagee had suffered the property to remain in the possession of the mortgagor until the mortgage became due, or until the sale thereon. The *bona fides* of the mortgage, and sale to and purchase by Lawrence, might have been attacked by other evidence, but then it would have been a question of fact for the jury. The plaintiff having become the donee of the property from the purchaser, on the day of the sale, the subsequent possession thereof must presumptively be deemed hers, and her title thereto could no more be attacked than could that of Lawrence, by simply proving the failure of the mortgagee to take possession of the property before the sale; in other words, the title of the plaintiff is not in law fraudulent by reason of such omission. I concede that the failure of the mortgagee to take possession of the property; the want of proof of an actual valid

consideration for the mortgage; the fact that the mortgagee was a daughter of the mortgagor; the relationship of the purchaser at the sale; the fact that no considerable portion of the purchase-money was paid at the sale, except by the purchaser's note, which is still unpaid; the immediate donation of the property by him to the wife of the mortgagor, and the continued possession thereof by her or her and her husband—are circumstances proper to be submitted to a jury, from which they might or might not determine that the mortgage and subsequent sale thereon, the purchase by Lawrence, and donation to the mortgagor's wife, were all acts done with intent to defraud, or hinder and delay the creditors of the mortgagor, in the collection of their debts; and if the jury had so found, I think their verdict would have been conclusive. But this should have been submitted to the jury, instead of being determined as a matter of law by the court.

The fourth proposition on which the complaint was dismissed at the circuit was, that if the proof of the gift was sufficient, the possession of the property by Allen afterwards made the property his, and subject to execution against him. This proposition has already been answered in the assertion, that if Lawrence acquired a valid title to the property, and the gift to the plaintiff be valid, the subsequent possession must be deemed the possession of the plaintiff.

I think the judgment should be reversed, and a new trial ordered, costs to abide the event.

All the judges concurred.

Judgment reversed, and new trial ordered.

WHAT CHANGE OF POSSESSION NECESSARY TO RENDER GIFT OF PERSONALTY VALID: See *Sims v. Sims*, 33 Am. Dec. 293; *Hillebrant v. Brewer*, 55 Id. 757; *Sanborn v. Goodhue*, 59 Id. 398; *Cummings v. Coleman*, 62 Id. 402, and notes. The principal case is cited in *Carradine v. Carradine*, 58 Miss. 293, as an authority on the elements of, and necessity for, delivery of a gift to the donee, or to a third person for the donee. Gifts of property and delivery thereof, similar to that stated in the principal case, were upheld in *Cooper v. Burr*, 45 Barb. 33, and *Mack v. Mack*, 5 Thomp. & C. 530, citing the principal case. At a mortgage sale, purchasing the property and taking immediate control and possession will confer a *prima facie* title, which it will require clear proof to overcome: *Talman v. Smith*, 39 Barb. 395; *Tallman v. Kearney*, 3 Thomp. & C. 414.

RIGHT OF WIFE TO ENJOY, CONTROL, AND POSSESS PROPERTY is full and complete, and where such property consists of household furniture kept in the husband's house, the wife is deemed to be in possession thereof: *Hanson v. Millett*, 55 Me. 189; *Porter v. McGrath*, 9 Jones & S. 102. A gift of a hus-

band to a wife will be upheld where rights of creditors are not in question: *Kelly v. Campbell*, 1 Keyes, 30. To prove a gift by the husband to his wife, his declarations at the time have been held admissible: *Kelly v. Campbell*, 2 Abb. App. Dec. 494; and his intention may be considered and shown: *Stevens v. Stevens*, 5 Thomp. & C. 89. All the above cases cite the principal case.

FOSTER v. JULIEN.

[24 NEW YORK, 28.]

INDORSER OF NOTE MAY BE CHARGED, BY NOTICE OF NON-PAYMENT, WITHOUT PRESENTMENT, where the maker of the note removes from the state before maturity of the note, and continues to reside abroad until after its maturity.

ACTION upon promissory note, made by one Vanden, payable to order of defendant, and by him indorsed. Note was dated at New York, where maker and indorser resided, and had three months to run. Before the note matured, the maker removed to New Jersey, and continued to reside there until after the note matured and was protested, and notice of protest given to defendant. The notary, on the day the note fell due, made inquiry for the maker at the post-office in New York City, and also examined the city directory, but the maker's residence, on such inquiry, could not be found. Upon these facts, the judge found, as a question of law, that the removal of the maker into the state of New Jersey, and his continued residence there till the note fell due, dispensed with the necessity of the demand upon him. The judgment for the plaintiff was affirmed at general term of the supreme court, and the defendant appealed.

Henry A. Morange, for the appellant.

John H. Reynolds, for the respondent.

By Court, DAVIES, J. The only question presented for consideration is, whether the change of residence of the maker from the state of New York to the state of New Jersey, intermediate the date of the note and its maturity, dispensed with the necessity of presenting the note at the last place of residence of the maker in this state, and demanding payment thereof there. It is not contended that the holder was bound to seek out the maker, or his place of residence in the state to which he had removed, for the purpose of presenting the note and demanding payment. But it is urged that the holder should have sought the last place of residence of the maker in

this state, and made the presentation and demand there. The supreme court of this state, in *Anderson v. Drake*, 14 Johns. 114 [7 Am. Dec. 442], say they had then (in 1817), in a late case not reported, decided, when the drawer of a note had removed to Canada—the note being dated and drawn in Albany, though not made payable in any particular place in that city—that a demand in Albany was sufficient to charge the indorser. It is not stated where the demand in that case was made in Albany; and it is not seen, upon the facts stated, how it could have been made, nor is any reason given for making it. It was decided in *Anderson v. Drake*, 14 Johns. 114 [7 Am. Dec. 442], that when a note is not made payable at any particular place, and the maker has a known and permanent residence within the state, the holder is bound to make a demand at such residence in order to charge the indorser. The general rule is, that the holder of a note, who seeks to charge the indorser, must demand payment of the note at its maturity of the maker, at his place of business or residence. If the note is payable at a particular place, the demand must be made at the appointed place. The holder must use all reasonable and proper diligence to find the maker, where no particular place of payment is appointed in the note. And the case of *Anderson v. Drake*, *supra*, established the rule, that where a change of residence of the maker took place between the making of the note and its maturity, and no place was appointed in the note for its presentment, the demand of payment must be made of the maker at his place of residence at the maturity of the note, provided such residence was within this state. *Taylor v. Snyder*, 3 Denio, 145 [45 Am. Dec. 457], was an action upon a note dated at Troy, in this state, the maker residing in Florida at the time of making the note, and at its maturity. No intermediate change of residence took place.

The payment of the note was demanded of the defendant, the indorsee thereon, at Troy, and on refusal, it was protested, and notice given. Beardsley, J., reviews ably and elaborately all the cases, when the presentment of the note for payment has been excused, and classifies the exceptions to the general rule, requiring presentment and demand to charge the indorser, and shows they all rest on peculiar reasons. He says: "In one, the maker has absconded; in another, he is temporarily absent, and has no domicile or place of business within the state; in a third, his residence, if any, cannot be ascertained; while in the fourth, he has removed out of the state, and taken up

his residence in another country. In each of these instances, let it be observed, the fact constituting the excuse occurs subsequently to the making and indorsement of the note, and it is this new and changed condition of the maker, and that only, by which the indorsee stands committed without a regular demand." In *McGruder v. Bank of Washington*, 9 Wheat. 598, the supreme court of the United States say, in reference to a change of residence to a foreign country or another state: "The reason and convenience are in favor of sustaining the doctrine that such a removal is an excuse from actual demand. Precision and certainty are often of more importance to the rules of law than their abstract justice. On this point, there is no other rule that can be laid down which will not leave too much latitude as to place and distance. Besides which, it is consistent with analogy to both cases that the indorser should stand committed in this respect by the conduct of the maker. For his absconding or removal out of the kingdom, the indorser is held, in England, to stand committed."

It is thus seen that the controlling element, which is introduced to establish the indorser's liability, is the change of condition after the making of the note. It is this change which commits the indorser, and excuses the presentment and demand of the bill. In this state, the rule has been regarded as well settled, since the decision of the case of *Anderson v. Drake*, 14 Johns. 114 [7 Am. Dec. 442], that a removal of a maker out of the state, after the making of the note and before its maturity, excuses the holder from presentment and demand. It is true that the court say that in the case of the removal of the maker of the note to Canada, intermediate its making and maturity, where the note was dated at Albany, a demand in Albany was held sufficient to charge the indorsee. Yet it is not stated when the demand in Albany, in that case, was made, or if the court deemed the fact of a demand essential. The principle of the case was that the removal of the maker excused presentment and demand, and the Canada case was decided in harmony with that principle, and it was not necessary to the case, or to render the decision in conformity with the previous cases, to advert to the fact that a demand of payment of the note, if any was made, was made in Albany. It was not relied on or adverted to that such demand was made at any particular place, and no reason is suggested why it should have been made at all, or that its being made was regarded as a material circumstance. The Canada case is certainly no

authority for the position of the defendant, that the demand should have been made at the late place of business or residence of the maker in this state. Beardsley, J., in *Taylor v. Snyder*, 3 Denio, 145 [45 Am. Dec. 457], says that "there is a further exception to the rule requiring a demand to be made of the maker, or at his domicile or place of business; for where a note is made by a resident of the state, who, before it is payable, removes from the state and takes up a permanent residence elsewhere, the holder need not follow him to make demand, but it is sufficient to present the note for payment at the former place of residence of the maker."

I have looked at all the authorities referred to in support of this position, and they fail entirely to sustain the point in the terms stated, and furnish no authority for the qualification that it is sufficient to present the note for payment at the former place of business of the maker. The learned judge was misled by the head-note to *McGruder v. Bank of Washington*, 9 Wheat. 598, which is in these words: "Where the maker of the note has removed into another state, or another jurisdiction, subsequent to the making of the note, a personal demand on him is not necessary to charge the indorser, but it is sufficient to present the note at the former place of residence of the maker." There is nothing in the case to warrant the qualification or suggestion in the head-note, relative to presenting the note at the former place of residence of the maker. It has long been well settled that a personal presentment of the note to the maker is not necessary to charge the indorser, neither will a presentment alone of the note suffice to charge the indorser; there must be a demand of payment and refusal. But no case which I have met with requires that the presentment and demand should be personal to and of the maker. A demand of payment at the place of business or residence of the maker was sufficient, and a refusal by any one there was all that was required. In *Cromwell v. Hynson*, 2 Esp. 511, it was held that the presentation of the bill to the wife at the party's house, he being the master of a ship and absent from England, was a sufficient demand: See also *Philips v. Astling*, 2 Taunt. 206. The facts as admitted in *McGruder v. Bank of Washington*, 9 Wheat. 598, were, that at the maturity of the note, neither the holder nor the notary knew of the removal from the District of Columbia of the maker, who resided there at the date of the note. Ten days before its maturity he removed out of the district to the state of

Maryland, nine miles distant from his previous residence. At its maturity, the note was delivered to a notary, who went with it to the house of the maker, where he last resided, and from which he had removed, in order there to present the note and demand payment, and not finding him there, and being ignorant of his place of residence, returned the said note under protest. Thus it is not alleged that the notary presented the note at the last place of residence of the maker in the district, or that he demanded payment of it from any one. And the court, in its opinion, does not advert to the fact that the notary went with the note to the maker's last place of residence, or intimate that he should have done so, and there presented it and demanded payment. But the court distinctly places its decision upon the fact that the removal of the maker after the date of the note, and before its maturity, out of the district into one of the states, being in another jurisdiction, absolved the holder from the necessity of presentation and demand of payment, and held the indorser duly charged, though neither was done. The court gave no intimation that the note had been presented at the maker's last place of residence, or that that fact was regarded as at all material.

The next case referred to by Justice Beardsley is that of *Anderson v. Drake*, 14 Johns. 114 [7 Am. Dec. 442], in which no such point arose, or is referred to. The only allusion to it is the remark made in relation to the Canada case, where it was said it was held that a demand in Albany was sufficient to charge the indorser. *Dennie v. Walker*, 7 N. H. 199, did not present the point, but so far as it bears on the present case, is an authority to sustain the judgment in this case. There the maker of the note resided in Portsmouth at the date of the note, but at its maturity was at sea, his family still residing there, and there had been no change of his residence. The court held that his absence did not excuse presentment and demand at his residence to charge the indorser. Upham, J., says: "A removal without the bounds of the government, after the making of a note, and before it becomes due, and where no place of payment of the note is specified, renders a demand upon the maker unnecessary; but this is an exception of the general rule, and must be construed strictly. Anything less than an actual change of residence by removal without the state would leave the rule too uncertain." The next case is that of *Gillespie v. Hannahan*, 4 McCord, 503. There the notary made inquiry for the maker of the note in Charleston, where it was dated, and where the maker

resided at the time it was made, but who had no residence at its maturity in Charleston, having in the mean time removed to Philadelphia. The notary protested the note, and gave notice to the indorser, without having made any presentment or demand. In an action against the indorser, the court held that where the maker had removed to another state, and resided there at the maturity of the note, the demand of payment was not necessary. The court say: "For all legal purposes, a neighboring state is regarded as a foreign country. Bills drawn on a sister state are regarded as foreign bills, and the terms 'beyond the seas,' used in the statute of limitations, have in construction been applied to a neighboring state. I come to the conclusion that, for the purposes of a demand on the maker of a promissory note, it must be so regarded; and that his absence from the state in which the note was made, and where it was understood it was to be paid, will excuse the holder from making a personal demand in order to charge the indorser." *Reid v. Morrison*, 2 Watts & S. 401, I regard as an authority in point. There the court held that if the drawer of the bill or maker of a note has absconded, that circumstance will dispense with the necessity of making any further inquiry after him. Citing Chitty on Bills, 261, Bayley on Bills, 95, in *Duncan v. McCullogh*, 4 Serg. & R. 480, the court say: "The same rule which exists in the case of absconding applies to that of the removal of the maker or drawee into another jurisdiction after the execution of the instrument."

Gist v. Lybrand, 3 Ohio, 307 [17 Am. Dec. 595], is also a case in point. It was urged there that no inquiry was made at the last place of residence of the maker for payment, he having intermediate the date of the note and its maturity removed from the state. The court say: "We all concur in the opinion with the supreme court of the United States upon the first point in this case. In the case of *McGruder v. Bank of Washington*, 9 Wheat. 598, cited by the plaintiffs' counsel, they have settled that the removal of the maker of a note after it was made and before its maturity, into a different state from that where he resided when the note was made, excuses the holder from making actual demand of payment from the maker. Whether a demand should be made at any other place is not made a point or adjudicated upon in that case. But it seems to us a clear consequence of the decision that such demand was unnecessary. The fact of removal commits the indorser and dispenses with all demand, unless a particular

place be appointed for the payment of the note in the note itself."

I entirely concur in the views thus clearly expressed by the supreme court of Ohio. I think they correctly apprehended the exact force and extent of the decision of the supreme court of the United States, and that case should be followed as an authority. There would have been no misapprehension in reference to that case, if the head-note of the reporter had not interpolated a qualification to the rule enunciated, not contained in the case or in the opinion of the court. This misapprehension undoubtedly led Mr. Justice Beardsley into the qualification of the rule, otherwise correctly enunciated by him, and which rule was fully sustained by the authorities cited; but they do not sustain the qualification of the rule, it being only found in this head-note. *McGruder v. Bank of Washington*, 9 Wheat. 598, was decided in 1824, and I think the rule then laid down was in harmony with previous adjudications in England and in this country; and as it establishes a uniform and reasonable and certain rule of commercial law, by the highest tribunal in the country, one not in conflict with our own decisions, I think we ought to recognize and adhere to it: This rule is approved by one of our most learned and able writers on the subject: Edward on Bills, 485, 486.

I have been able to find but one case where a different rule has been announced. It is that of *Wheeler v. Field*, 6 Met. 290. There the court held, to charge an indorser upon a note dated in New York, where the maker had removed out of the state where it was made and dated, before its maturity, that a demand should have been made at the maker's last place of residence in New York, when he had removed to the state of Illinois. No authorities are cited for the opinion expressed, and no reasons are given why it should be recognized. It is certainly in direct conflict with those which have been already referred to, and it is not in harmony with the principles settled in numerous cases. We think it better to adhere to the long-settled rule, as laid down in *McGruder v. Bank of Washington*, 9 Wheat. 598, even although cases might be supposed in which its application might, by possibility, work some wrong. It is of the highest importance in a commercial community that the rules relating to the presentment, demand, and protest of notes and bills should be certain, and when once enunciated should be adhered to; and no reasons are suggested which we think should influence us to depart from or modify the rule

as laid down by the United States supreme court in the case in 9 Wheaton. We think it is a reasonable, just, and proper rule, and one which should have universal application.

The judgment appealed from should be affirmed, with costs.

DENIO, LOTT, JAMES, and HOYT, JJ., concurred.

MASON, J., delivered a dissenting opinion.

COMSTOCK, C. J., expressed no opinion.

SELDEN, J., did not sit in this case.

Judgment affirmed.

PRESENTMENT, AND WHAT EXCUSES WANT OF: *Carmichael v. Bank of Pennsylvania*, 35 Am. Dec. 408; *Prescott Bank v. Caverly*, 66 Id. 473; *Windham Bank v. Norton*, 56 Id. 397; *Adams v. Darby*, 75 Id. 115. Necessity of presentment to bind indorser: *Bigelow v. Kellar*, 54 Id. 555; *Stephenson v. Dickson*, 62 Id. 369. Waiver of presentment: *Olendorf v. Swartz*, 63 Id. 141. Mere notice of non-payment not sufficient to charge indorser: *Jones v. Robinson*, 54 Id. 212. What is sufficient presentment: *Smith v. Philbrick*, 69 Id. 315; *White v. Stoddard*, 71 Id. 711; *Malden Bank v. Baldwin*, 74 Id. 627. Presentment before last day of grace is premature: *Edgar v. Greer*, 74 Id. 316.

THE PRINCIPAL CASE IS CITED in *Adams v. Leland*, 30 N. Y. 312, and in *Smith v. Poillon*, 23 Hun, 630, to the point that where the maker of a note removes into another state, subsequent to the making of the note, and continues to reside there, the indorser is chargeable without presentment or demand.

BURR v. BEERS.

[24 NEW YORK, 178.]

MORTGAGEE MAY DIRECTLY ENFORCE, BY PERSONAL ACTION, LIABILITY OF GRANTEE OF MORTGAGED PREMISES, who has assumed payment of mortgage, without foreclosing the mortgage, and without impleading the original obligor and mortgagor.

ACTION to recover amount of two mortgages, executed by the mortgagor, with his bonds. After giving the mortgages, mortgagor conveyed the mortgaged land subject to the mortgages to defendant, by a deed containing an assumption clause, whereby defendant assumed to pay the mortgages, as part of the consideration of the conveyance. Plaintiff's intestate prosecuted this suit to judgment, but died pending this appeal, when the action was continued in the name of the plaintiff as his administratrix. The plaintiff on the trial proved the actual delivery of the deed by mortgagor to the defendant.

Defendant objected that there was no privity of contract between him and plaintiff, but the justice before whom the case was tried held otherwise. The plaintiff had judgment for the amount of the mortgages, which was affirmed at a general term of the supreme court, and defendant appealed.

J. D. Beers, for the appellant.

E. F. Bullard, for the respondent.

By Court, DENIO, J. If the plaintiff had sought to foreclose the mortgages in question, and to charge the defendant with the deficiency which might remain after applying the proceeds of the sale, and had made both the mortgagor and the present defendant parties, the authorities would be abundant to sustain the action in both aspects: *Curtis v. Tyler*, 9 Paige, 432; *Halsey v. Reed*, Id. 446; *Marsh v. Pike*, 10 Id. 595; *Blyer v. Monholland*, 2 Sandf. Ch. 478; *King v. Whitely*, 10 Paige, 465; *Trotter v. Hughes*, 12 N. Y. 74 [62 Am. Dec. 137]; *Vail v. Foster*, 4 Id. 312; *Belmont v. Coman*, 22 Id. 438 [78 Am. Dec. 213]. But I do not understand that the right to a personal judgment for the deficiency is based upon the notion of a direct contract between the grantee of the equity of redemption and the holder of the mortgage. The cases proceed upon the principle that the undertaking of the grantee to pay off the incumbrance is a collateral security acquired by the mortgagor, which inures by an equitable subrogation to the benefit of the mortgagee. Then the statute relating to foreclosures provides that if the mortgage debt be secured by the obligation or other evidence of debt executed by any other person besides the mortgagor, such person may be made a defendant, and may be decreed to pay the deficiency: 2 R. S., p. 191, sec. 154. Chancellor Walworth puts the right to a personal judgment in such a case upon the equity of this statute: *Curtis v. Tyler*, 9 Paige, 432; and Vice-Chancellor Sandford expressly says that the obligation is not enforced as being made by the grantee of the equity of redemption under such a deed to the mortgagee, but as a promise by the former to the mortgagor to pay him the amount of the mortgage, by paying it to the mortgagee in payment of his debt, which promise the mortgagee is equitably entitled to lay hold of and enforce under the equity of the statute referred to: *Blyer v. Monholland*, 2 Sandf. Ch. 480. It is obvious that the judgment of the supreme court in the present case cannot be sustained upon the doctrine referred to. The plaintiff does not ask to foreclose

the mortgage, and does not make the principal debtor, Bullard, a party. If the judgment can be supported at all, it must be upon the broad principle that if one person make a promise to another for the benefit of a third person, that third person may maintain an action on the promise.

Upon that question, there has been a good deal of conflict of judicial opinion. As long ago as 1817, Chancellor Kent laid it down as a point decided, and referred to not less than eight English and American cases as sustaining the principle: *Cumberland v. Codrington*, 3 Johns. Ch. 255 [8 Am. Dec. 492]; and since then it has been frequently affirmed by judges, after an attentive examination of cases; as in *Barker v. Bucklin*, 2 Denio, 45 [43 Am. Dec. 726], and in the cases therein referred to. These cases, and also those referred to by Chancellor Kent, are doubtless subject to some of the criticisms which have since been applied to them. Some of the opinions were pure *obiter dicta*, and in others the cases, though presenting the point, were decided upon other grounds. It cannot, however, be denied that the doctrine had been so often asserted that it had become the prevailing opinion of the profession that an action would lie in such a case in the name of the creditor for whose benefit the promise was made. Finally, the question came squarely before this court in *Lawrence v. Fox*, 20 N. Y. 268, and we held, with hesitation on the part of a portion of the judges who concurred, while others dissented, that the action would lie. We must therefore regard the point as definitely settled, so far as the courts of this state are concerned. The judgment appealed from, being in accordance with the law as adjudged in that case, must be affirmed.

LOTT, J., also delivered an opinion for affirmance, and all the judges concurred.

Judgment affirmed.

LIABILITY OF GRANTEE WHO ASSUMES PAYMENT OF MORTGAGE: See *Trotter v. Hughes*, 62 Am. Dec. 137, 141, note; *Abell v. Coons*, 68 Id. 229. Purchaser of land subject to mortgage, with notice, is estopped to deny validity of mortgage: *Rigg v. Cook*, 46 Id. 462; *Gilliam v. Bird*, 49 Id. 387, note; *Johnston v. Crasoley*, 71 Id. 173.

THE PRINCIPAL CASE IS CITED to the point that a mortgagee may maintain an action at law against a grantee of the mortgaged premises who has assumed the payment of the incumbrance, in *Ranney v. McMullen*, 5 Abb. N. C. 256; *Stephens v. Casbacker*, 8 Hun, 118; *Thayer v. Marsh*, 11 Id. 504; S. C. affirmed, 75 N. Y. 342; *Whiting v. Gearty*, 14 Hun, 500; *Pike v. Seiter*, 15 Id. 404; *Steers v. Okilda*, Id. 518, 519; *Pardee v. Treat*, 18 Id. 301; *Beecher v.*

Ackerman, 1 Abb., N. S., 149; S. C., 1 Robt. 38; *Wilcox v. Campbell*, 35 Hun, 258; *Edick v. Green*, 38 Id. 206; *Perkins v. Squier*, 1 Thomp. & C. 621; *Ricard v. Sanderson*, 41 N. Y. 181; *Miller v. Winchell*, 70 Id. 439; *Ayers v. Dixon*, 78 Id. 323; *Thorp v. Keokuk Coal Co.*, 47 Barb. 446; S. C. affirmed, 48 N. Y. 257; and it is cited to the point that in order to render the grantee directly and personally liable to the holder of the mortgage, the words used must clearly import that the grantee will pay, in *Collins v. Rowe*, 1 Abb. N. C. 97; *Adams v. Wadhams*, 40 Barb. 227; *Hartley v. Tatham*, 10 Bosw. 282; S. C., 24 How. Pr. 507; *Mallory v. West Shore etc. R. R. Co.*, 3 Jones & S. 178; *Stephens v. Cornell*, 32 Hun, 415; and to the point that an agreement to assume the liability of another cannot be enforced by the creditor, unless supported by a good and sufficient consideration, the principal case is cited in *Fairchild v. Feltman*, Id. 401; *First National Bank v. Chalmers*, 39 Id. 473. In support of the principle that an action will lie on a promise made by a defendant upon a valid consideration to a third party for the benefit of the plaintiff, though the plaintiff was not privy to the consideration, the principal case is cited in *Martin v. O'Connor*, 43 Barb. 522; *Auburn City Bank v. Leonard*, 40 Id. 134; *Huber v. Ely*, 45 Id. 170; *Schindler v. Euell*, 45 How. Pr. 38; *Borell v. Newell*, 3 Daly, 234; *Duparquet v. Knubel*, 24 Hun, 655; *People v. Metropolitan R'y Co.*, 26 Id. 84; *Germania Nat. Bank v. Taake*, 31 Id. 264; *Real Estate Trust Co. v. Balch*, 13 Jones & S. 532; *Becker v. Torrance*, 31 N. Y. 643; *Dingeldein v. Third Avenue R. R. Co.*, 37 Id. 577; *Turk v. Ridge*, 41 Id. 206; *Barker v. Bradley*, 42 Id. 322; *Coster v. Mayor of Albany*, 43 Id. 411; *Hutchings v. Miner*, 46 Id. 460; *Claflin v. Ostrom*, 54 Id. 584; *Glen v. Hope Mut. L. Ins. Co.*, 56 Id. 381; *Shaver v. Western Union Tel. Co.*, 57 Id. 469 (dissenting opinion of Dwight, J.); *Barlow v. Myers*, 64 Id. 43; *Simson v. Brown*, 68 Id. 358; *Campbell v. Smith*, 71 Id. 28; *Bennett v. Bates*, 94 Id. 370. It is cited in *Comstock v. Drohan*, 8 Hun, 374; S. C. affirmed, 71 N. Y. 9; *Wales v. Sherwood*, 52 How. Pr. 414; *Vrooman v. Turner*, 69 N. Y. 282; to the point that the liability of the grantor of mortgaged premises, grantee having assumed payment of mortgage, is only that of surety; and in *Catco v. Davies*, 8 Hun, 222, overruling *Perkins v. Squier*, 1 Thomp. & C. 620, to the point that agreement between holder of mortgage and grantee covenanting to assume, extending time of payment, made without consent of grantor, discharges the grantor. In *Billings v. Robinson*, 28 Hun, 140, Daniels, J., in dissenting opinion, cites the principal case in support of the principle that the fact of assumption by the grantee does not relieve the original obligor. And it is cited in *Waterman v. Webster*, 33 Id. 616, as authority that the old common-law rule, that in respect to a deed *inter partes* a stranger could not at law avail himself of a stipulation in his favor contained in it, does not exist in New York.

THE PRINCIPAL CASE IS DISTINGUISHED in *Garnsey v. Rogers*, 47 N. Y. 237, the latter case holding that a covenant by a mortgagee with the mortgagor to pay a prior mortgage was a promise for the benefit of the mortgagor only, and could not be made the basis of an action by the prior mortgagee. See also *Vrooman v. Turner*, 69 Id. 285; *Seward v. Huntington*, 94 Id. 113, where the principal case is likewise distinguished. So it is distinguished in the case of *Douglass v. Wells*, 18 Hun, 88, 93, which holds that the grantor of mortgaged premises cannot release the liability created by the assumption of the mortgage by his grantee, by any act or agreement to which the mortgagee does not assent. But see dissenting opinion by Learned, J., 18 Id. 96.

CASES AT LAW
IN THE
SUPREME COURT
OF
NORTH CAROLINA

GARDNER v. KLUTTS

[8 JONES'S LAW, 375.]

WIFE'S DECLARATIONS MADE SHORTLY AFTER BIRTH OF CHILD, that it had been born alive, are not competent evidence to establish her husband's title to an estate by the curtesy.

EJECTMENT. Plaintiffs' lessors were admitted to be the heirs at law of the late wife of defendant, Klutts, who claimed as tenant by the curtesy. To establish his title, defendant proved by a witness that she was called in as a midwife to Mrs. Klutts on her confinement; that on her arrival, she found that the woman had been delivered of a child, which was then dead. Defendant offered to prove by this witness the declarations of the mother, to the effect that the child had been born alive, and that it had cried and survived its birth a few minutes; and that the conversation occurred shortly after the birth of the child. The evidence was objected to and excluded, and defendant's counsel excepted. Verdict and judgment for plaintiffs, and appeal by defendant.

Fleming and Kerr, for the plaintiffs.

Boyden and B. R. Moore, for the defendant.

By Court, PEARSON, C. J. A wife is not a competent witness for or against her husband: *State v. Jolly*, 3 Dev. & B. 110 [82 Am. Dec. 656]. It follows that her declarations cannot be evidence for or against him; otherwise more weight is given to what she says, when not on oath, than to what she would say on oath, which is absurd.

The declarations in this case were made shortly after the birth of the child, and we will suppose as soon as the midwife arrived, at which time the act of delivery was over—"a fact accomplished." So whether the child was born alive or dead, could in no wise affect or have any bearing upon that fact. The suggestion, therefore, that this declaration of the wife was admissible as a part of the *res gestæ* is not supported.

The position that the declarations of the mother in respect to her child "is natural evidence," and admissible on that ground, is also untenable.

This kind of evidence is not based upon the competency of the witness, for it is the evidence of facts, as distinguishable from the testimony of witnesses, as is said in *Biles v. Holmes*, 11 Ired. 16: "The actions, looks, and barking of a dog are admissible as natural evidence upon the question as to his madness; so the squealing and grunting or other expressions of pain made by a hog are admissible upon a question as to the extent of an injury inflicted on him. This can in no sense be called the testimony of a hog or dog;" so the declarations and looks of a slave are admissible upon a question as to the condition of his health: *Roulhac v. White*, 9 Id. 63; *Wallace v. McIntosh*, 4 Jones, 434.

But the declaration offered as evidence in this case clearly does not fall within the principle of natural evidence. Instantly after the delivery, the existence and presumed individuality of the child was distinct from and had no further connection with the mother. So, although expressions of pain and declarations showing her own bodily condition on the part of the wife would have been admissible, if material to the issue, yet what she said in regard to the condition of the child was collateral, and had no natural guaranty of truth. It may have been the voluntary expressions of a mother's grief; but on the other hand, the declaration may have been made under the influence of her husband, whose estate, as tenant by the curtesy, depended on the fact of the child's having been born alive. There is no error.

Judgment affirmed.

COMPETENCY OF WIFE'S DECLARATIONS AGAINST HUSBAND: See *Gilchrist v. Bale*, 34 Am. Dec. 469; *Casteel v. Casteel*, 44 Id. 763; *May v. Little*, 38 Id. 707.

DECLARATIONS OF WIFE CONCERNING HER SEPARATE PROPERTY ARE ADMISSIBLE only so far as they come within the doctrine of *res gestæ*: *McLemore v. Pinkston*, 68 Am. Dec. 167.

HUNTER v. ANTHONY.

[8 JONES'S LAW, 385.]

INSTRUMENTS SHOULD BE LIBERALLY CONSTRUED, in order to give them effect, and to carry out the intention of the parties.

INSTRUMENT SUSCEPTIBLE OF TWO CONSTRUCTIONS SHOULD RECEIVE THAT BY WHICH IT WILL TAKE EFFECT, where by the other construction it would be inoperative for want of a subject-matter to act on.

ASSUMPSIT on the following written order, and the acceptance thereon: "Mr. William Anthony. Please pay to James T. Hunter, constable, all the executions in his hands for collection as they come due against me and brother; this March 4, 1857. J. W. Holt." Indorsed: "The within order this day accepted by William Anthony, March 4, 1857. William Anthony." Plaintiff offered in evidence sundry justices' judgments in favor of divers persons against J. W. Holt and brother, rendered upon warrants which had been served by the plaintiff as constable, and also showed that executions had issued on them, which had been stayed by the parties, and that the papers containing these judgments, executions, and stays of execution were in his hands at the date of the order. Defendant objected to the admission of these papers, on the ground that they were not executions at the date of the order and acceptance, and asked the court to instruct the jury that they did not sustain the plaintiff's cause of action. The jury were charged that if they believed from the evidence that the judgments and executions issued and stayed, as above stated, were in the hands of the plaintiff at the time the order was given, and that the order was intended to apply to them, and was so accepted by the defendant, they should find for the plaintiff. Defendant's counsel excepted. Verdict and judgment for plaintiff, and appeal by defendant.

Phillips and Norwood, for the plaintiff.

Graham, for the defendant.

By Court, PEARSON, C. J. The papers which were in the hands of the plaintiff can be made to fit the description given in the acceptance of the defendant by aid of the maxim, *Ut res magis valeat quam pereat*, which means that instruments should be liberally construed, so as to give them effect and carry out the intention of the parties; and when an instrument is susceptible of two constructions, one by which it will take effect, and the other by which it will be inoperative for

the want of a subject-matter to act on, it shall receive that construction which will give it affect. This rule is based on the presumption that when parties make an instrument, the intention is that it shall be effectual, and not nugatory.

"Executions in the hands of an officer," taken literally, would apply to process in his hands, which was then in a condition to be acted on, and would not fit judgments in the officer's hands on which execution had been stayed; but by aid of the words "as they come due," we see that the word "executions" is not to be taken literally, for the papers to which reference was made were some that were about to become due at different times; and taking the whole description, they as aptly point out judgments on which were entered "executions issued and stayed" as any other terms of description that could have been used.

The suggestion that these words ought to be considered surplusage has nothing to support it. That is sometimes done in order to give effect to an instrument in which repugnant words are used, but is never applied for the purpose of defeating an instrument. There is no error.

Judgment affirmed.

INTENTION GOVERNS IN CONSTRUCTION OF CONTRACT: *Tindall v. Conover*, 40 Am. Dec. 220; *Chapman v. Glassell*, 48 Id. 41; *State v. Paye*, 40 Id. 708; *Stewart v. Preston*, 44 Id. 621.

MEANING OF WORDS, HOW DETERMINED IN CONSTRUING CONTRACT: *Pillsbury v. Locke*, 66 Am. Dec. 711; *Conwell v. Pumphrey*, 68 Id. 611; *Luott v. Gatch*, 71 Id. 635; *White v. Smith*, 75 Id. 589.

INSTRUMENT TO BE CONSTRUED TO GIVE EFFECT TO INTENTION OF PARTIES: *Hughes v. Lane*, 50 Am. Dec. 436; *Menard v. Scudder*, 56 Id. 610; *Howell v. Howell*, 47 Id. 335.

WRITTEN CONTRACT TO BE CONSTRUED BY COURT AND NOT BY JURY: *Randall v. Thornton*, 69 Am. Dec. 56.

STATE v. ENGLAND.

[8 JONES'S LAW, 899.]

FINDING ARTICLE BY DIRECTION OF OWNER, AND TAKING IT AS HIS BAILER, but afterwards concealing it, and denying the finding, is but a breach of bailment, and not larceny.

INDICTMENT for larceny. The jury found, as a special verdict, that "the article alleged to have been stolen was, with others, in a carpet-bag, which was lost by the prosecutor on

the highway. In passing defendant's residence on the highway, the prosecutor informed him of the loss of his carpet-bag, and requested him to get it and give it to a person designated. Defendant found the carpet-bag, and took it into possession, and on application for it, stated that he did not have it, and had not found it. Search being made, it was found concealed in a bag, which was tied up, and secreted on his premises. Some of the articles which the carpet-bag contained were missing, but whether they were taken out by the defendant did not appear." On this verdict, the court was of opinion that the defendant was not guilty of larceny, and gave judgment that he be discharged, from which the solicitor for the state appealed.

Jenkins, attorney-general, for the state.

Gaither, for the defendant.

By Court, BATTLE, J. It is conceded, and as we think properly, by the attorney-general, upon the facts found by the special verdict, the defendant is not guilty of stealing the shirt of the prosecutor as charged in the bill of indictment. The taking of the carpet-bag in which the shirt and other articles were contained was not a trespass, because it was done by the express directions of the owner, and the defendant, instead of being a trespasser by such taking, became a bailee of the article for the purpose of carrying and delivering it to a certain person in the village of Marion. The subsequent concealment of the carpet-bag before the trust created by the bailment was performed, even if done *animo furandi*, was not a larceny, but only a breach of trust. This doctrine has been established by many decisions, of which a collection may be found in Roscoe's Criminal Evidence, beginning at page 596, 3d Am. from 3d Lond. ed.

We have assumed that the carpet-bag was taken by the defendant under a bailment, because the special verdict finds such to have been the fact, and no intendment can be raised that the defendant formed the design before he found the article to take and appropriate it to his own use. Whether the testimony would have justified the jury in taking the latter view, and finding accordingly, and if so, what would have been the legal consequence of it, is not our province to decide.

The terms of the special verdict preclude another view of the case, which might have been adverse to the defendant.

It seems that the carpet-bag, when found concealed on the defendant's premises, had been rifled, and a part of its contents taken out and carried away; but whether the shirt was one of the missing articles is not stated; though it is stated, as a part of the verdict, that it did not appear that the missing articles were taken by the defendant. Had the jury found that they were taken *animo furandi* by him, it might have been contended that he was guilty of larceny, upon the distinction thus stated by Lord Hale: "If a man deliver goods to a carrier to carry to Dover, and he carry them away, it is no felony; but if the carrier have a bale or a trunk with goods in it delivered to him, and he break the bale or trunk and carry the goods away *animo furandi*, it is a felonious taking." See 1 Hale P. C. 504, 505; Roscoe's Crim. Ev. 598. The grounds upon which this distinction is based, and many of the cases given in illustration of it, may be found cited and commented upon in the latter work, but it is unnecessary for us to pursue the inquiry here, for the reason already stated, that the terms of the special verdict prevent the question from being presented.

There is no error in the judgment from which the appeal is taken, and it must be so certified to the superior court.

Judgment affirmed.

WHAT CONSTITUTES LARCENY: See *Sneed v. State*, 41 Am. Dec. 102; *People v. Call*, 43 Id. 655; *McDaniel v. State*, 47 Id. 93; *State v. Seagler*, 42 Id. 404; *State v. Hawkins*, 33 Id. 294; *State v. Lindenthall*, 57 Id. 743; *Commonwealth v. Wilde*, 66 Id. 350; *State v. South*, 75 Id. 250; *State v. Homes*, 57 Id. 271, note.

LARCENY BY FINDER OF LOST GOODS: See *Hunt v. Commonwealth*, 70 Am. Dec. 443; *Pritchett v. State*, 62 Id. 468.

LARCENY IN SERVANT OR BAILER: *State v. Fairclough*, 76 Am. Dec. 599; *State v. Homes*, 57 Id. 280, note.

CASES
IN THE
SUPREME COURT
OF
OHIO.

HETTRICK v. WILSON.

[12 OHIO STATE, 136.]

NOTICE OF MOTION TO VACATE JUDGMENT rendered at former term must be given to the adverse party.

ORDER VACATING JUDGMENT ON PLAINTIFF'S MOTION WILL BE REVERSED ON ERROR where there is no finding by the court that the plaintiff had a valid cause of action, and the statute provides that "a judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense in the action in which the judgment is rendered; or if the plaintiff seeks its vacation, that there is a valid cause of action."

NO PRESUMPTION THAT APPELLANT RECEIVED NOTICE OF MOTION TO VACATE JUDGMENT arises, upon appeal from an order vacating a judgment, from the fact that the record is silent upon the subject.

ERROR to the district court of Hamilton county. The opinion states the case.

Stephen Clark, for the plaintiff in error.

John W. Caldwell, for the defendant in error.

By Court, Scott, C. J. The record in this case shows that the plaintiff in error brought into the court of common pleas of Hamilton county, by appeal, the transcript of a judgment rendered against him by a justice of the peace of the county, in an action in which the defendant in error was plaintiff. The transcript was filed on the fourth day of May, 1855, and a rule taken against the defendant in error to file his petition in the case by the next rule day. At a subsequent term, on the twenty-eighth day of May, in the same year, default was entered against the defendant in error for want of a petition;

and on the twenty-ninth of June following, judgment was entered against him, on such default, dismissing his action without prejudice, and at his costs.

At the following November term of the court, to wit, on the fifth day of November, 1855, the plaintiff below, by his counsel, filed his motion to set aside judgment of nonsuit, and for leave to file petition, but without any assignment of reasons therefor; and at the same term, on the eighth of December, he filed an additional motion to set aside the judgment of dismissal, and for leave to file petition and reinstate the case, and set it down for trial, as the court might order. Various causes were assigned in support of this motion, which need not be particularly stated, as it is very clear that none of them were such as would, under the five hundred and thirty-fourth section of the code, authorize the court to vacate, upon motion, a judgment of its own, rendered at a preceding term, except such as might be brought within the third subdivision of causes specified in that section; that is to say: "For mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order."

At the same November term, to wit, on the fourth day of January, 1856, the court made the following order in the case: "On motion of plaintiff's attorney, and good cause shown, it is ordered that the order dismissing this cause, made at the May term, 1855, be set aside, and leave is given to the plaintiff to file a petition, which is accordingly done."

The record does not show any appearance of the plaintiff in error in the proceedings for vacating the judgment, nor that any notice was served upon him or his attorney of the motion for that purpose; nor is there any finding or adjudication by the court that the plaintiff had a valid cause of action.

The defendant below filed his petition in error in the district court to reverse the order of the court of common pleas vacating the judgment of dismissal entered at the previous May term.

The district court affirmed the order of the common pleas, and this judgment of affirmance is now sought to be reversed. There was a general assignment of errors in the district court, which we think renders it proper for us to examine errors not specially assigned in that court, and which are relied on here.

There can be no doubt that the order of the court of common pleas, which is sought to be reversed, is one "affecting a substantial right made in a special proceeding in an action

after judgment," and is therefore the proper subject of review upon error: Code, sec. 512.

It is provided by section 538 of the code that "a judgment shall not be vacated on motion or petition, until it is adjudged that there is a valid defense in the action in which the judgment is rendered; or if the plaintiff seeks its vacation, that there is a valid cause of action." And as the record in this case shows no adjudication of the court upon the validity of the plaintiff's cause of action, it is difficult to see how the order vacating the judgment can be sustained.

But we think the want of notice to the defendant below of the motion to vacate forms a still graver ground of exception to the order of vacation. A judgment, final in its character, had been rendered in the case at the May term of the court. By that judgment, the defendant was acquitted and dismissed without day. At the close of the term he was no longer in court. No further action could be taken in the case, prejudicial to his interest, without notice to him. The plainest principles of justice, as well as the express provisions of the code, required this. The language of the statute is: "The proceedings to correct mistakes, or omission of the clerk, or irregularity in obtaining a judgment or order, shall be by motion upon reasonable notice to the adverse party, or his attorney in the action:" Sec. 535. The code further provides that such notices must be in writing, prescribes what facts they shall state, and how they shall be served: Secs. 505-507.

It has been suggested that where the record is silent on the subject, we must presume that the defendant below was regularly in court.

But we cannot so hold in this case. For however far we might presume in favor of the validity of a judgment, where the parties are shown to have been before the court, and where they could, therefore, have made the error complained of appear affirmatively, by exception or otherwise, yet no such presumption can be admitted to prevent the direct impeachment of a judgment, where the subject of complaint is that the party has had no day in court, and so had no opportunity of placing anything upon the record.

The judgment of the district court, and the order of the court of common pleas vacating the judgment rendered at the previous term, must be reversed.

SUTLIFF, PECK, GHOLSON, and BRINKERHOFF, JJ., concurred

NO VALID JUDGMENT CAN BE RENDERED AGAINST DEFENDANT, who has not had notice, either actual or constructive: *Flint River Steamboat Co. v. Roberts*, 48 Am. Dec. 178; *Flint River Steamboat Co. v. Foster*, Id. 248, note 269 et seq.; *Borden v. State*, 54 Id. 217, note 242. The principal case is cited to the point that a judgment, order, sentence, or decree of a court disposing of property subject to conflicting claims will not affect the rights of any one not a party to the proceeding, and who was never in any way notified of the pendency of the proceeding: *Ray v. Brigham*, 12 Nat. Bank. Reg. 151.

BREESE v. STATE.

[12 OHIO STATE, 146.]

INDICTMENT CHARGING BOTH BURGLARY AND LARCENY IS NOT DEMURRABLE FOR DUPLICITY.

UPON VERDICT OF GUILTY OF BURGLARY AS CHARGED, returned on indictment charging both burglary and larceny, the court may sentence for burglary, without awaiting a response to the charge of larceny.

PERSON IS CONSTRUCTIVELY PRESENT AT BURGLARY, AND MAY BE INDICTED AND CONVICTED AS PRINCIPAL, where he agreed with others to commit the burglary upon a store, and in order to facilitate the breaking and entry, and lessen the chances of detection, agreed on the night of the burglary to procure and decoy the owner away from the store in which he usually slept, to a house about a mile distant, and detain him there while the other confederates were breaking and entering the store and removing the goods, and the parties performed the respective parts of their agreement.

INSTRUCTION IS NOT ERRONEOUS, WHERE THERE IS ANY EVIDENCE TENDING TO PROVE FACTS upon which it is based, and it correctly states the law applicable to such evidence.

VERDICT MUST BE CLEARLY CONTRARY TO EVIDENCE to justify reversal of judgment on that ground.

INDICTMENT containing one count and charging the plaintiff in error with a burglarious breaking and entering of the storehouse of William Whetstone in the night season, with intent to steal, etc., and with then and there stealing certain goods of the value of eight dollars and a half. The plaintiff in error demurred to the indictment for duplicity, in charging two offenses subject to different penalties in one and the same count. The demurrer was overruled, and the plaintiff in error excepted. The jury returned a verdict of guilty of the burglary as charged, but the verdict did not respond in any way to the charge of petit larceny contained in the same count. A motion for a new trial was overruled, and a bill of exceptions tendered and allowed. The defendant was sentenced to the penitentiary, and this writ of error is prosecuted to reverse the judgment. The opinion in other respects states the case.

Yaple and Mackey, for the plaintiff in error.

James Murray, attorney-general, for the state.

By Court, PECK, J. The plaintiff in error has made twelve special assignments and one general assignment of error upon the record, on which he asks a reversal of the judgment and sentence; but in the argument presented to us, he only relies upon the following points, which embrace, substantially, all the special assignments: 1. The court erred in overruling the demurrer to the indictment for duplicity; 2. The court erred in passing sentence on the defendant, upon a verdict which responded to only one of the charges made in the indictment; 3. The court erred in its charge to the jury; 4. The verdict is contrary to the law; 5. The verdict is contrary to the evidence.

The first and second points may very properly be considered together.

The general rule undoubtedly is, that two distinct crimes or offenses cannot properly be joined in the same count of an indictment, and that such joinder will be fatal on demurrer or on motion to quash: Whart. Crim. L. 192, and cases cited; but this rule is by no means of universal application, and one of the exceptions, as well established as the rule itself, is, that a burglary and larceny committed at the same time may be thus united: Id. 192, 614.

In such case, the burglarious entry with intent to steal, and the consummation of that intent by actual theft, are so connected that the two crimes may be charged in the same count, in order, it is said, to convict of the one on a failure to establish the other: Whart. Crim. L. 614; 1 Hale P. C. 560; *Rex v. Withal*, 1 Leach C. C. 88.

It is said, indeed, in *Stoops v. Commonwealth*, 7 Serg. & R. 499 [10 Am. Dec. 482], that only one offense is charged in such indictment, "and that is burglary:" and in *Rex v. Withal*, 1 Leach C. C. 88, that the larceny is merged in the burglary. It is nevertheless clear, that if acquitted of the burglary, the prisoner may be convicted and sentenced for the larceny: *Commonwealth v. Tuck*, 20 Pick. 360; *State v. Cocker*, 3 Harr. (Del.) 554; *State v. Grisham*, 1 Hayw. (N. C.) 17; Roscoe's Crim. Ev. 367. It is said, however, in *State v. Moore*, 12 N. H. 44, that by conviction of the burglary, works the merger, and with this qualification, the cases in Sergeant and Rawle and in Leach, *supra*, harmonize with the cases above cited, which

authorize a conviction for the larceny if acquitted of the burglary; and also with *Commonwealth v. Hope*, 22 Pick. 10, *Josselyn v. Commonwealth*, 6 Met. 240, and *State v. Moore*, 12 N. H. 44, which determine that where the two offenses are included in the same count, the prisoner, on a general verdict of guilty, can be sentenced for the burglary but not for the larceny.

The result deducible from these principles and authorities is:

1. That the indictment was not faulty for duplicity, and the demurrer for that cause was properly overruled.

2. That upon a verdict of "guilty of the burglary in manner and form," etc., the court might legally proceed to sentence for that crime, without awaiting a response to the charge of petit larceny. The public justice was not injuriously affected by a failure to find the defendant guilty of that offense, because, as we have seen, no sentence could have been passed upon the defendant for it after conviction for the burglary; and the legal rights of the defendant were in no sense compromised, as a verdict of acquittal of the petit larceny could not in any way affect the verdict of guilty of the burglary. The two offenses, though connected in their perpetration, are distinct. A burglarious entry with the felonious intent, already found by the jury, completed the burglary, while the felonious asportation of the goods would establish the larceny, irrespective of the manner in which the defendant gained access to the place where they were deposited.

3. Did the court err in that portion of its charge to the jury which is stated in the bill of exceptions?

This part of the charge relates exclusively to a theory, started, no doubt, in the argument, and in view of a portion of the testimony as to what would constitute a constructive presence of the defendant, if the jury should find that he was bodily absent when the breaking and entry were accomplished. What the court may have said as to the statutory ingredients of the crime of burglary, and in their comments upon the testimony in the cause connecting the defendant personally with the burglary, and as to the presumptions arising from the possession of a part of the goods taken at the time, and the defendant's conduct, statements, and demeanor respecting them, detailed in the testimony, is not stated in the bill of exceptions, and we must therefore presume that what the court did say was ample and unexceptionable.

The charge which is copied into the statement of the case,

and which, on account of its length, I do not propose to repeat here, was, substantially, that if the jury should find, beyond a reasonable doubt, from the testimony, that the defendant had agreed with others to commit the burglary on the night on which it was done, and that, as a part of said agreement, and to facilitate the breaking and entry and lessen the chances of detection, it was agreed that the defendant should on that night procure or decoy the owner, Whetstone, away from the store in which he usually slept, to a party about a mile distant, and detain him there, while the other confederates were to break and enter said store and remove the goods, and that both parties did in fact perform their respective parts of said agreement—that then the defendant was constructively present at the breaking and entry by his confederates, and might be convicted as principal therein, if all the other material allegations were proved beyond a reasonable doubt.

We are free to say that this charge, if there was evidence tending to prove it, is unexceptionable.

“Any participation in a general felonious plan, provided such participation be concerted, and there be a constructive presence, is enough to make a man principal in the second degree:” Wharton’s Crim. L. 113; and the case cited by Wharton to establish the rule shows what is meant by a “constructive presence.”

“If several act in concert to steal a man’s goods, and he is induced by fraud to trust one of them in the presence of the others, with the possession of such goods, and another of them entices him away, that the man who has the goods may carry them off, all are guilty of the felony:” *Rex v. Standley*, Russ. & Ry. C. C. 305.

The defendant was, by the agreement, not only to procure Whetstone to go to the party, “to give his confederates greater security from detection while in the act of breaking into the store,” but the jury were required to find, as a part of the supposed case, that the defendant “kept him there, while his confederates were engaged in breaking said store, and in concealing the fruits of said crime in pursuance of said previous confederacy.”

The charge would therefore seem to fall within the well-known rule stated in Archbold’s Criminal Law, 10, “that persons are said to be present who are engaged in the same design with the one who actually commits the offense, although

not actually present at the commission of it, yet are at such convenient distance as to be able to come to the assistance of their associates if required, or to watch to prevent surprise, or the like."

Bishop, in section 460, volume 1, of his treatise on criminal law, says: "If the will of such other one contributed to the act, the test to determine whether the law deems him a principal rather than an accessory is, whether he was so near, or otherwise so situated, as to make his personal help, if required, to any degree available."

The part assigned by the agreement to the defendant—a constant supervision over Whetstone while the burglary was effected—formed an essential part of the plan of the burglary agreed upon, as much so as the rending of the shutter or the forcing of the door. And the defendant, in the case supposed, was constructively present at the burglary, if Jones, who, in the case of *Rex v. Standley*, Russ. & Ry. C. C. 305, enticed McLaughlin away, was constructively present at the subsequent asportation of McLaughlin's money by his confederates, Standley and Webster.

So in *Hess v. State*, 5 Ohio, 12 [22 Am. Dec. 767], it is said: "And in general, if several unite in one common design, to do some unlawful act, and each takes the part assigned him, though all are not actually present, yet all are present in the eye of the law:" Citing Fost. 450, 353; 1 Hale P. C. 439; 2 Stark. Ev. 7.

But it is said that there was not any evidence before the jury as to a confederacy between the defendant and other persons, and that the charge, assuming such an agreement as possible, was entirely unsupported by evidence, and should not therefore have been given.

It is doubtless true that the judge should not charge the jury upon a hypothetical case, entirely without the testimony, because such a course is calculated to mislead the jury and induce them to suppose that such a state of facts, in the opinion of the court, was possible under the evidence, and might be considered by them. But where there is any evidence tending to prove the fact which the charge assumes, the court may properly make it the subject of comment.

In the case before us, there were facts and circumstances in evidence, which, if true, tended in some degree to prove such confederacy; as, for instance, the frequent and persistent efforts of the defendant to induce Whetstone to go to the party

after he had declined to do so; his turning back for a while, when Whetstone joined the others on the way; his leaving the party several times during its continuance, and on one occasion for more than an hour and a half; his continued and boisterous hallooing while returning from the party toward the store and in company with Whetstone, just before the burglary was discovered. The testimony of Gregory, who accompanied the defendant and others on their return from the party, shows that after leaving them, some at Calvin's house, the others at the store, and on the top of the hill beyond, he being then alone, started on a run, and at the distance of about a half a mile beyond the store he found in the road two pieces of cloth, one of satinet and the other of tweed, identified by Whetstone and Calvin as having been taken from the store on the night of the burglary, which finding was immediately preceded by a noise as of persons running rapidly through the brush and woods skirting the road, indicating that others connected with the burglary had been frightened and were escaping pursuit. And defendant's statement to Cotter "that he knew how he got the goods, but dare not tell." If these facts were not sufficient, in view of countervailing proof, to establish a confederacy, they at least tended to prove it, and thereby rendered the charge pertinent to the testimony, and one, therefore, fully within the province of the court to give to the jury.

Lastly, it is said that the verdict is contrary to the evidence, but before we can reverse a judgment for this reason it must be clearly so.

The jury who try a cause, and the court before which it is tried, have much better opportunities to determine the credibility and effect of the testimony, and we ought, therefore, to hesitate before disturbing a verdict rendered by a jury and confirmed by a court, possessing such advantages, merely because there is an apparent conflict in the testimony. The conflict or its effect might all disappear, if the witnesses were examined before us, and we could see and hear them face to face, as they were seen and heard by the court and jury whose verdict and judgment are passing in review before us.

We have carefully reviewed all the testimony submitted to the jury, consisting of some thirty-six manuscript pages, and while we find some conflict in the testimony, we are by no means prepared to say that the defendant was not rightly convicted as principal in the burglary.

DEFENDANT IN ACTION FOR BREACH OF PROMISE IS NOT SUBJECT TO AGGRAVATION OF DAMAGES because he introduces evidence of the licentious conduct of the plaintiff, which fails to prove it, provided the evidence shows that at the time of the alleged breach he had reasonable ground for believing its truth.

INSTRUCTION MUST BE APPLICABLE TO TESTIMONY, and where there is testimony tending to bring the case fairly within an exception to a general rule, an instruction will be misleading which states the general rule as applicable to the testimony without stating it to be merely a general rule, and subject to exceptions, and without adverting to such testimony.

MANIFEST DISTINCTION EXISTS BETWEEN FAILURE TO CHARGE AND GIVING CHARGE CALCULATED TO MISLEAD, and though the failure to state a qualification of a general rule given to a jury may not of itself justify a reversal, unless the court, upon request, should refuse to give it, still if it is manifest that the jury erred for want of such instruction, the judgment will be reversed.

RULE THAT FAILURE OF DEFENDANT TO PROVE CHARGE OF PLAINTIFF'S LICENTIOUS CONDUCT, in action of breach of promise of marriage, is an aggravation of damages, applies as well where such defenses are made orally in court as where the charge is made by plea or by notice, *semble*.

WHERE, FROM WHOLE RECORD, IT APPEARS THAT JURY WERE MISLED BY INSTRUCTION, the judgment will be reversed, though the instruction is correct as an abstract proposition of law.

ACTION for breach of promise of marriage. The defendant, White, denied that he ever made the alleged promise. A verdict for two thousand six hundred and sixty-six dollars was rendered for the plaintiff. The defendant moved for a new trial, and the motion being overruled, the defendant excepted, took a bill of exceptions, and filed a petition in error to this court to reverse the judgment entered on the verdict. The opinion states the case.

James Murray, Peter B. Lowe, and John Howard, for the plaintiff in error.

Gunckel and Strong, and Conover and Craighead, for the defendant in error.

By Court, PECK, J. Several errors are assigned upon the record for the reversal of this judgment, which have not been considered by us, as we are satisfied that the judgment must be reversed upon other grounds, and that most if not all the alleged errors which are fairly presented upon the record and unnoticed by us are not likely to occur upon a retrial of the cause.

The particular error for which we reverse the judgment arises under the third assignment—"that the court misdirected the jury."

The charge is, in the main, a fair and just exposition of the law relating to promises to marry, but we are of the opinion there is error in that part of the charge which authorizes the jury to impose "aggravated damages" upon the defendant, on his failure to prove the licentious or dissolute conduct of the plaintiff, which he upon the trial had attempted to prove. That portion of the charge is not, perhaps, very objectionable, as a mere abstract proposition; but in view of the testimony set forth in the bill of exceptions, the charge, as it was given and unaccompanied by material qualifications, was well calculated to mislead the jury, and when we look at the amount of the verdict, and the evidence to support it, we can scarcely avoid the inference that it did in fact mislead the jury, to the detriment of the plaintiff in error.

The charge, so far as it relates in any degree to the exceptionable matter, is as follows:

"In mitigation of damages and to reduce the amount to be awarded, the defendant may, when the pleadings are as in this case, offer proof that the plaintiff was guilty of licentious or dissolute or even indecent or immodest conduct after the promise or before, if unknown to the defendant at the time of making the promise, and such proof should be considered by the jury in mitigation of damages. But although the defendant has not pleaded such facts, to justify his refusal to perform the contract, and charged them upon the record, yet if he set them up in court, and attempt to prove them in mitigation of damages, and fail altogether in the proof, the jury may consider this in aggravation of damages, as being an aggravation of the injury done to the plaintiff. The jury will in this case look to the proof to determine how far it establishes the fact of licentious, dissolute, or indecent conduct upon the part of the plaintiff, after the promise or before, and in the latter case whether it was unknown to the defendant."

"He [defendant] has attempted to prove that she [the plaintiff] was with child in 1856, by way of excuse, or as mitigating damages. If this is true, and was unknown to him at the time of making the promise, it would certainly go very far in mitigation, even if he had heard that such was the fact, and disbelieved it, and had reason to disbelieve it, and afterward it proved to be true, this would be a strong fact in mitigation.

"The same rule will apply to all the proof offered of dissolute or indecent conduct on her part; and in fixing the damages, the jury will look to the proof of the facts charged, and

to his knowledge, or want of knowledge, of them at the time of making the promise—to what he is shown to have known or heard, to create belief in their truth, and to his declaration of belief or unbelief made before that time.”

The bill of exceptions discloses that before this charge was given to the jury, testimony had been submitted to them tending to prove, not only that the plaintiff had been guilty of immodest and indecent conduct with persons other than the defendant, after her alleged engagement, but that she had, prior to that time, been pregnant of a bastard child, and that though the suspicions of the defendant had been aroused in regard to it, his suspicions were allayed by the assurances and denials of the plaintiff.

The testimony to establish her pregnancy consisted of the statements of three physicians of the results of examinations and observations made by them, and of the observations and opinions of unprofessional persons of both sexes, some of them the friends and relatives of the plaintiff.

While we are free to say that, after a careful examination of all the evidence upon both sides, we are by no means satisfied that there is any truth in the charge of pregnancy, nor that there was, in view of the habits and customs of that locality, any culpably immodest or indecent conduct on the part of the plaintiff below; we are also inclined to the opinion that the plaintiff in error was not entirely without excuse in failing to perform his engagement, and in proving those statements and rumors when sued for a breach of his promise to marry, unless he was then satisfied of their falsity, or at least had good reason to believe the report of her pregnancy untrue; and that he might properly do so, without subjecting himself to an increased penalty upon a failure to establish their truth.

The charge of the court, as we understand it, is that, inasmuch as the defendant had attempted to prove, upon the trial, the pregnancy and licentious conduct of the plaintiff, if “he should fail altogether in the proof” (that is, in producing testimony reasonably tending to prove her guilt in those particulars), the attempt itself would be an aggravation of damages, and the jury might so regard it.

We understand that the “aggravated damages” authorized by the charge are to be assessed by way of punishment of the defendant, and not merely of compensation to the plaintiff. The damages do not arise out of the contract, or its breach, but out of the subsequent act of the defendant, needlessly

affecting the character and feelings of the plaintiff, and is, therefore, a punishment for such wrongful act. We also understand from said charge that this "aggravation" attaches to charges made orally in court, as well as when made in the more enduring form of an answer or plea.

With regard to the first of these propositions, we think the charge, as an abstract proposition, was erroneous in not adding thereto the material qualification, "unless you should find from the evidence that the defendant had reason to believe them to be true," or words of equivalent import: *Sloan v. Petrie*, 15 Ill. 425; *Swails v. Butcher*, 2 Ind. 184; *Fiddler v. McKinley*, 21 Ill. 308.

Unless, indeed, it is to be inferred, from the utter failure of proof, that the charge was made in bad faith, and, as a charge, to be applied to the facts in evidence, and none others should be given by the judge conducting the trial, it was clearly erroneous in not annexing such a qualification: *Id.*

The judge presiding at the trial, while instructing the jury, should be careful not to mislead them, or suffer them to be misled by others; but this result would almost inevitably follow if he should deliver to them a general rule of law as applicable to the testimony, without stating it to be merely a general rule, and subject to exceptions, and without adverting to the testimony before them, bringing or tending to bring the case fairly within an exception to that rule. There is a manifest distinction between a failure to charge and the giving of a charge which is calculated to mislead, and though it is said that the failure to state a qualification of a general rule given to a jury will not, of itself, justify a reversal, unless the court, upon request, should refuse to give it: *Barton v. Glasgo*, 12 Serg. & R. 149. Still, if it is manifest the jury erred for want of such instruction, the judgment will be reversed: *Penton v. Sinnickson*, 9 N. J. L. 149; *Etting v. Bank of United States*, 11 Wheat. 59.

As regards the second proposition—the right to aggravated damages—while we admit that most of the cases in which a failure to prove the charge has been held to aggravate the damages, are cases in which the charge was made by plea or by notice, still a majority of the court would be disposed to hold, were it necessary, that the same rule is also applicable to cases where such defenses are made orally in court. There seems to be no substantial difference in principle between the two cases. The difference is at most only in degree. The

motive which actuates, and for which the aggravation is imposed—a malicious and wanton desire to injure another—is the same in both cases. It is unnecessary, however, to decide this proposition now, and as the members of the court are not entirely agreed, it is waived for the present.

The case of *Fiddler v. McKinley*, 21 Ill. 308, is almost identical with the case at bar in all its aspects. In that case, which was also an action for breach of promise, the defendant, under the general issue, attempted to prove that the plaintiff was a lewd woman, but failed, and the court below charged the jury that the attempt to make such proof, when such attempt fails, though made in good faith, should be taken into consideration as an aggravation of the damages. The judgment was reversed for this erroneous charge—the court of last resort holding that the rule as to pleas of justification applied to oral charges in open court, and that in neither could a failure in the proof be held to aggravate the damages, if the charge was made in good faith. This case is therefore a direct authority upon both the points we have been considering.

The testimony in regard to the pregnancy and licentious conduct of the plaintiff had been heard by the court and jury, and when the court, in applying the law to the evidence, told the jury that they might give aggravated damages if defendant failed altogether in the proof, without any allusion to the testimony produced by the defendant, and tending to create a belief in defendant that the charges were true, directs them “to look to the proof to see how it establishes the fact of licentious or indecent conduct upon the part of the plaintiff,” the jury would be apt to infer that it was the fact of pregnancy, and not a reasonable belief of its truth, which was to exempt the defendant from such aggravated damages. This inference would also receive further confirmation from the remaining part of said charge, in which the court, speaking of the attempt to prove that the plaintiff was with child in 1856, says: “If this is true, it would go far in mitigation of damages;” and that a like result would follow if such report should be proved to be true, though it had been disbelieved by the defendant.

The concluding part of the charge, in which the jury are told in general terms, in fixing the damages, “to look to what he (the defendant) is shown to have known or heard, to create belief in their truth, and to his declaration of belief or unbelief

made before that time," is much too obscure, and too far removed from the rule itself, and to which it makes no express allusion, to have been properly appreciated by the jury, even if it was intended as a qualification of the rule previously given.

But if we are wrong in the assumption that, under the charge, the damages for a failure to prove the pregnancy of the plaintiff were to be assessed by way of punishment, and not compensation, still the charge, unaccompanied by the qualification, would be none the less exceptionable. The facts proved were calculated to create, in many minds, a firm belief in her guilt, and to deny to a defendant, acting in good faith, the right to explain his conduct without subjecting himself to increased damages, would be, in effect, dragging him to the sacrifice, not only bound, but effectually gagged.

Were the question *res nova*, we might be led to inquire as to the principle upon which exemplary damages are allowed in actions for breach of promises to marry, which are in form *ex contractu*, and not *ex delicto*, but it is perhaps too well and too generally settled to be now disturbed by us: *Davis v. Slagle*, 27 Mo. 600; *Southard v. Rexford*, 6 Cow. 254; *Fiddler v. McKinley*, 21 Ill. 308; *Coryell v. Colbaugh*, 1 N. J. L. 77 [1 Am. Dec. 192]. It is, we presume, because such actions, though in form *ex contractu*, partake also of the character of actions *ex delicto*: Sedgwick on Damages, 369; *Green v. Spencer*, 3 Mo. 318; and remarks of Breese, J., in *Fidler v. McKinley*, 21 Ill. 318.

After bestowing upon this charge, and the testimony set forth in the bill of exceptions, a careful consideration, we are satisfied that the jury may have understood, from the instructions as given, that a failure to establish the pregnancy or the dissolute conduct of the plaintiff by a preponderance of proof would authorize them to increase the damages, independent of any reasonable belief by defendant of the truth of the charges, or of the good faith in which they were preferred; and in looking at the evidence by which these charges were supported, and the amount of the verdict, which, with the probable costs, exceeds one third of the entire estate of the defendant, we are apprehensive that it was so regarded and acted on by the jury.

The evidence, as set forth in the bill of exceptions, has but few, if any, of the appropriate elements for punitive damages; and the amount awarded would seem beyond the range of compensatory damages, under the facts in evidence as to the con-

duct and demeanor of the plaintiff below, both before and since the breach. The amount of the damages, however, would not authorize us to interfere with the verdict in actions of this character, merely because it exceeds our own estimate of what it should have been; but the amount of the verdict in this case, under the circumstances, induces us to believe that the jury, in their estimate of them, were misled by the charge of the court.

Judgment reversed, verdict set aside, and cause remanded for further proceedings.

SCOTT, C. J., and SUTLIFF, GHOLSON, and BRINKERHOFF, JJ., concurred.

INSTRUCTIONS SHOULD BE APPLICABLE TO EVIDENCE: *Chicago etc. R. R. Co. v. George*, 71 Am. Dec. 239; *Brown v. Illius*, Id. 49; *Abbott v. Gatch*, Id. 635; *Hosley v. Brooks*, Id. 252; *Andre v. Bodman*, Id. 628; *Parks v. Foster*, Id. 221, and notes.

JUDGMENT WILL NOT BE REVERSED FOR ERRONEOUS BUT UNPREJUDICIAL CHARGE: *Williams v. Carpenter*, 76 Am. Dec. 316, note 318.

INSTRUCTION CORRECT AS ABSTRACT PROPOSITION IS PROPERLY REFUSED if it does not fully state the rule with reference to the facts of the case: *Hunt v. Crane*, 69 Am. Dec. 381, and note. Abstract instructions correct as propositions of law, if they have misled the jury, are ground for reversal: Note to *State v. Whit*, 72 Id. 541.

ATTEMPT TO PROVE UNCHASTITY OF PLAINTIFF IN BREACH OF PROMISE as aggravation of damage: Note to *Burnham v. Cornwell*, 63 Am. Dec. 547. In an action for breach of promise to marry and for seduction, where the defendant wantonly, with intent to injure the plaintiff, and without reasonable belief that he will be able to prove it, alleges in his answer that the plaintiff is unchaste and has had illicit intercourse with other men, it may be considered in aggravation of damages: *Haymond v. Saucer*, 84 Ind. 10, citing the principal case. When, however, in an action of slander, the truth of the words spoken is pleaded in justification, in good faith, under an honest belief in their truth, and with reasonable grounds for such belief, the plaintiff is not, by reason of such plea, on failure of proof to sustain it, entitled to exemplary damages, nor should it be regarded as an aggravation beyond the real injury sustained by the plaintiff: *Rayner v. Kinney*, 14 Ohio St. 286, citing the principal case. There seems to be no substantial difference in principle between a case where the charge impugning the character of the plaintiff is pleaded and a case where the defense is made orally at the trial. The difference is at most only in degree. The motive which actuates and for which the aggravation is imposed—a malicious and wanton desire to injure another—is the same in both cases: *Rayner v. Kinney*, 14 Ohio St. 286.

SMITH v. STATE.

[12 OHIO STATE, 466.]

ATTEMPT BY MALE PERSON OF SEVENTEEN YEARS AND UPWARD TO HAVE CARNAL CONNECTION with a female child under the age of ten years, with her consent, is not indictable under a statute providing for the punishment of an assault with intent to commit rape, though another statute provides that "if any male person of the age of seventeen years and upward shall carnally know and abuse any female child under the age of ten years, with her consent, every such person so offending shall be deemed guilty of rape;" for an assault upon a consenting female, old or young, is a legal impossibility.

INDICTMENT for assault with intent to ravish. The first count charged an unlawful, forcible, and felonious assault upon Desire Franks, with the intent, her, the said Desire Franks, then and there forcibly, unlawfully, and against her will to ravish and carnally know. The second and third counts were identical, with the exception that the alleged assault was laid at different dates. The opinion states the case.

Thurman, Wildman, Watsom, Stern, Johnson, Buckland, and Everett, for the plaintiff in error.

James Murray, attorney-general, for the state.

By Court, PECK, J. The prosecuting attorney, before the trial in the court below, entered a *nolle prosequi* as to the first count, and the plaintiff in error was tried, convicted, and sentenced upon the two remaining counts of the indictment.

It is now insisted that the said judgment and sentence should be reversed and the plaintiff in error discharged, because neither of those counts charge any crime or offense known to the laws of Ohio.

Both counts of the indictment are drawn under the seventeenth section of the "act for the punishment of crimes (1 S. & C. Stat. 407, 408), which reads as follows: "Sec. 17. That if any person shall assault another, with intent to commit a murder, rape, or robbery upon the person so assaulted, every person so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be imprisoned in the penitentiary and kept at hard labor, not more than seven nor less than three years."

Both counts (omitting the time and place stated therein) charge "that the defendant, with force and arms, in and upon one Desire Franks, did unlawfully and feloniously make an

assault, with intent, unlawfully and feloniously, to carnally know and abuse the said Desire Franks; the said defendant being a male person of the age of seventeen years and upward, and the said Franks being a female child under the age of ten years; contrary to the form of the statute in such cases provided, and against the peace and dignity of the state of Ohio."

It is not averred in either count that the assault was made with the intent to have carnal knowledge of the said Desire Franks, forcibly and against her will, nor are any other words of equivalent import employed. For aught that is alleged, she may have consented to all that was done or attempted by the accused, and such must be the construction of the indictment, in the absence of such averment.

The concluding portion of the respective counts, which describes the assailant as "a male person of the age of seventeen years and upward," and the person assaulted as a female child under the age of ten years, with a presumption of consent to be deduced from the failure to aver that the attempt was forcible and against her will, makes a case which, if the attempted connection had been consummated, would have come within the purview of the last clause of the fifth section of the same statute, which provides that "if any male person of the age of seventeen years and upward shall carnally know and abuse any female child under the age of ten years, with her consent, every such person so offending shall be deemed guilty of a rape, and upon conviction thereof shall be imprisoned in the penitentiary," etc.

The question, therefore, arises, whether the mere attempt by a male person of the age of seventeen years and upward to have carnal connection with a female child under the age of ten years, she consenting to the connection, and voluntarily submitting her person to his operations, is a crime in Ohio, and as such punishable under the seventeenth section above mentioned.

It must be borne in mind that we have no common-law offenses in this state. No act or omission, however hurtful or immoral in its tendencies, is punishable as a crime in Ohio, unless such act or omission is specially enjoined or prohibited by the statute laws of the state. It is therefore idle to speculate upon the injurious consequences of permitting such conduct to go unpunished, or to regret that our criminal code has not the expansiveness of the common law.

Two things must concur to authorize a conviction under the seventeenth section: there must have been an assault, coupled with an intent to commit a rape upon the person assaulted.

An assault implies force upon one side, and repulsion, or at least want of assent, upon the other. An assault, therefore, upon a consenting party would seem to be a legal absurdity.

Rape is defined to be the unlawful carnal knowledge, by a man, of a woman, forcibly and against her will: 2 Bishop's Crim. L., sec. 935; 1 East P. C. 434. This definition necessarily involves an assault upon the woman, and an absence of consent to the act upon her part.

In 2 Bishop's Criminal Law, section 930, the learned author, in treating of this crime and its ingredients, remarks: "The general proposition of the law is very distinct and broad, that the will of the woman must oppose the act, and that any inclination favoring it is fatal to the prosecution;" and cites *Regina v. Hallett*, 9 Car. & P. 748; *State v. Murphy*, 6 Ala. 765 [41 Am. Dec. 79]; *Pleasant v. State*, 13 Ark. 360; *Woodin v. People*, 1 Park. Cr. 464; S. P., Id. 643; *Charles v. State*, 11 Ark. 389.

Among the admitted exceptions to this rule are cases of females who are *non compos*, who can have no intelligent will; persons reduced to a state of insensibility, and violated while in that condition; and cases where the consent has been induced, or the opposition prevented, by fears of personal violence; and among the more questionable are cases where the consent has been obtained, or opposition prevented, by fraud or false personation. See, on this subject, 2 Bishop's Crim. L., secs. 40, 939, 940; Wharton's Crim. L., 513 et seq.; *State v. Murphy*, 6 Ala. 765 [41 Am. Dec. 79], where these exceptions are discussed.

With regard to cases of carnal connection consummated, or as the case may be, only attempted, with children under ten years age, and consenting to such connection, the decided weight of authority in England seems to be that such connection, if consummated, does not constitute a rape; and that where it is not consummated, the person cannot be found guilty of an assault with intent to commit a rape, nor even of a common assault: *Regina v. Read*, 1 Den. C. C. 377; and see note *a* to page 379; *Regina v. Webb*, 2 Car. & K. 937; *Regina v. Martin*, 9 Car. & P. 213; *Regina v. Meredith*, 8 Id. 589.

Nor can the accused, in such case, be found guilty of an assault under 1 Vict., c. 85, sec. 11, which enacts that on all trials

for felony, where the crime charged includes an assault against the person, the defendant may be acquitted of the felony, but found guilty of the assault and punished therefor, by imprisonment not exceeding three years; because the crime charged in the indictment includes an assault, and the evidence does not warrant such finding: *Reginia v. Banks*, 8 Car. & P. 575; *Reginia v. Meredith*, Id. 589; and particularly note *a* to *Regina v. Read*, 1 Den. C. C. 379.

The statute 9 Geo. IV, c. 31, sec. 17, makes it felony to have carnal knowledge of female children under twelve years of age, even with their consent. If the child is under ten years of age, the felony is punishable with death, and if between ten and twelve years of age, with imprisonment at hard labor, at the discretion of the court; and it has been repeatedly held that this statute does not deprive the female child of the power to consent which she had at common law; and consequently, that if she did in fact consent, there could not be an assault: See cases *supra*.

In a charge of rape upon a consenting child only nine years old, Lord Denman, C. J., said: "Mr. Robinson has argued that she could not give a legal consent; but I think it is enough if she gave an actual consent." The remarks of Alderson, B., and Parke, B., are to the same effect: *Regina v. Read*, 1 Den. C. C. 381.

The case of *Hays v. People*, 1 Hill (N. Y.), 351, decided in 1841, was an indictment for an assault with intent to commit a rape upon a child under ten years of age, but consenting thereto, and is directly opposed to the cases above cited; Cowen, J., holding that "the assent of such an infant being void as to the principal crime, it is equally so in respect to the incipient advances of the offender." The learned judge does not further elaborate the point, and cites no authority for the position, and none is cited by counsel upon either side. And with all due submission to the learned judge, we cannot perceive that a statute punishing a man for having carnal connection with a consenting child makes the consent actually given void, or deprives her of the power to consent. The most that can be said of it is, that the statute declares that such consent, if in fact given, shall be no defense to the guilty participant. Such a statute, then, cannot make that an assault which was not one before its enactment.

Most of the cases above cited from the English reports were determined since the decision in 1 Hill was made, and that

court was not probably aware of any of them; but at all events, it is opposed to the decided weight of the authorities. See also 1 Russell on Crimes, 7th ed., 693–697, where most of the cases are collected.

Section 4 of the act for the punishment of crimes (1 S. & C. Stat. 404) punishes a person who shall have carnal knowledge of his daughter or sister, forcibly and against her will, by imprisonment for life; and the first clause of section 5 punishes one who shall have carnal knowledge of any woman or child other than his daughter or sister, forcibly and against her will, by imprisonment for a term of years. And the legislature, having thus provided for the punishment of rape as known to the common law, proceeds to provide for a consummated connection with a child under ten years of age, with her consent. This last offense does not fall within the common-law definition of a rape; but the legislature say in that section that “the person so offending shall be deemed guilty of a rape.” This part of the section is substantially like section 4, chapter 7, of 18 Elizabeth, and section 17, chapter 31, of 9 George IV., with this exception: the two English statutes declare the act to be a felony, while our statute declares that the perpetrator shall be deemed guilty of a rape. It was coupled in the same section with an offense falling clearly within the common-law definition of a rape. It was, perhaps, an inadvertence on the part of the legislature to so denominate it, and they may not have intended thereby to change the common-law signification of that term. They, however, had power to christen as well as to create the offense, and we are not authorized to disregard so plain an intimation of the legislative will, and must, therefore, hold that such consummated act would be a rape within the meaning of the statute. But if this be true, it by no means follows that the mere attempt to have carnal knowledge of a consenting child would constitute an offense under the seventeenth section.

As already remarked, this section requires an assault upon the child, coupled with an intent to have such carnal knowledge, and if either ingredient is wanting, the offense is incomplete.

In *Baker v. State*, 12 Ohio St. 214, it was held “that the statute does not define an assault, nor specify the acts or degree of participation which will render a party guilty thereof;” and that “these are matters which the statute leaves to be determined by the definitions, rules, and principles of the common law.”

It has been already sufficiently demonstrated, by a reference to decided cases and the comments of elementary writers, that in cases falling within the last clause of section 5, there is not, and in the nature of things cannot be, an assault upon the female child, as known and defined in the common law; that an assault upon a consenting female, old or young, is a contradiction in terms—a legal impossibility.

It is insisted on the part of the state that the last clause of the fifth section takes from a female child under ten years of age the power and capacity to consent to a carnal connection. But to this we reply, in the language of Chief Justice Denman, in a similar case arising under the English statute: "It is enough if she gave an actual consent:" *Regina v. Webb*, 2 Car. & K. 937. The statute does not abrogate nor annul a consent actually given, but declares that such connection shall be punished, notwithstanding such consent. The consent is not made void, but it neither excuses nor justifies the act.

To bring the case within the seventeenth section, there must have been, not only an intent to commit a rape, but that intent must have been manifested by an assault upon the person intended to be ravished. The statute requires both ingredients, and we can dispense with neither. An assault implies force upon one side, and repulsion, or want of assent, upon the other. The crime of rape, at common law, necessarily included an assault, but the rape defined and punished by the last clause of section 5 does not require an assault.

It is manifest, therefore, that a mere attempt to commit this last or statutory kind of rape is not within the purview of section 17. The legislature may have inadvertently adopted a phraseology which necessarily excludes it, or they may have designed to make no other or further innovation upon the common-law rule, except to provide that such consummated connection with a child should be punished as a rape.

It is much to be regretted that an attempt to have carnal knowledge of a child of such tender years, the child consenting thereto, and the attempt not having been consummated, is not punishable as a crime in Ohio. In this respect, our little ones are not so well protected from demoralizing influences as are the children of the country from which we mainly derive our laws.

It could not, as we have seen, be punished even there as an assault upon the child, and much less as an assault with intent to commit a rape; but the statutes of 18 Elizabeth and

of 9 George IV., before mentioned, declare the consummated act a felony; and the common law makes an attempt to commit a felony, whether common-law or statutory, indictable as a misdemeanor: *Regina v. Meredith*, 8 Car. & P. 590.

The conclusion to which we have come—that the indictment under consideration does not charge any crime or offense under the statutes of Ohio—requires the reversal of the judgment and sentence, and the discharge of the plaintiff in error.

Judgment accordingly.

SUTLIFF, C. J., and GHOLSON and SCOTT, JJ., concurred.

BRINKERHOFF, J., dissented.

RAPE.—Definition.—Rape is the act of a man in having unlawful carnal knowledge of a woman forcibly and without her consent. This definition describes the crime as it is now generally regarded. The old writers defined rape as the having of unlawful carnal knowledge of a woman forcibly and against her will: 1 East P. C. 434; 4 Bla. Com. 210; 1 Hawk. P. C., Curw. ed., 122, sec. 2; 2 Inst. 180; 3 Id. 60; 1 Hale P. C. 628; 1 Russell on Crimes, 3d Eng. ed., 675; but the more accurate definition defines the crime as committed without the consent of the woman rather than against her will, for the crime may be committed when strictly the woman exhibits no will at all in the matter, as where she is drugged, or *non compos mentis*. So also it may be committed where the act is not strictly against her will, but is effected without her conscious and proper consent, as where non-resistance or acquiescence is obtained through fear or fraud. The fault of the old definition may be evaded by holding that “against her will” is equivalent to “without her consent:” *Commonwealth v. Burke*, 105 Mass. 376. But the English statute of Westm. 2, c. 34, 1285, provides that the crime is committed where a woman is ravished, “where she did not consent,” and the later English authorities sustain the position that it is the ravishment of a woman without her consent, rather than against her will, that constitutes the crime of rape: *Regina v. Fletcher*, 8 Cox C. C. 131; S. C., Bell C. C. 63, 71; *Regina v. Campbell*, 1 Den. C. C. 89; S. C., 1 Cox C. C. 220; 1 Car. & K. 746; *Regina v. Ryan*, 2 Cox C. C. 115. And it must be concluded that the more accurate definition will contain “without her consent,” rather than “against her will.”

CARNAL KNOWLEDGE—PENETRATION MUST BE PROVED, BUT NOT EMISSION.—The common law of England until 1781, and consequently the common law of this country as stated by Mr. East (1 East P. C. 436–440), is, that proof of penetration is sufficient, and emission need not be proved, since the forcible dishonor of the female, which is the essence of the crime, is effected completely by penetration without emission: So *Robertson's Case*, 1 Swin. 93. But in a later English case, decided in 1781, long after the colonization of this country, the majority of the judges held emission indispensable, on the ground that “carnal knowledge” could not exist without emission: *Hill's Case*, 1 East P. C. 439; so also *Rex v. Burrows*, Russ. & Ry. 519. The law of England is now, however, settled by the statute of 9 Geo. IV., c. 31, sec. 18, and by 24 & 25 Vict., c. 100, sec. 63, to the same effect, which makes penetration alone sufficient, and emission unnecessary, to constitute

the offense. This construction of the statute is maintained in *Rex v. Cox*, 1 Moody, 337; S. C., 5 Car. & P. 297; *Brook's Case*, 2 Lewin, 267; *Regina v. Allen*, 9 Car. & P. 31; *Rex v. Jennings*, 4 Id. 249; S. C., 1 Lewin, 93; *Rex v. Cozins*, 6 Car. & P. 351. In this country, the common law as stated by East, *supra*, should settle the question, and establish that emission is not necessary, and that penetration is sufficient, and such is now the current of authority: See *State v. Shields*, 45 Conn. 256; *Pennsylvania v. Sullivan*, Addis. 143; *Comstock v. State*, 14 Neb. 205; *Osgood v. State*, 25 N. W. Rep. 529. In Ohio and North Carolina it has been held that emission is necessary, but this is now in both states dispensed with by statute: See *Williams v. State*, 14 Ohio, 222; *Blackburn v. State*, 22 Ohio St. 102; *Noble v. State*, Id. 541; *State v. Gray*, 8 Jones, 170; *State v. Hargrave*, 65 N. C. 466; 74 Ohio Laws, 349, sec. 31. In New York, a statute provides that the slightest penetration is sufficient: *People v. Crowley*, 6 Northeastern Rep. 384. Emission is presumed from proof of penetration: 1 East P. C. 440; *Comstock v. State*, 14 Neb. 205.

Penetration is necessary according to all the authorities, and even emission without penetration will not be sufficient: 3 Inst. 60; 1 Hale P. C. 628; *Audley's Case*, 3 Howell's St. Tr. 401, 403; *Fitzpatrick's Case*, Id. 419. In *Osgood v. State*, 25 N. W. Rep. 529, it is said that there must be penetration of the female organ by the whole organ of the male. So also in the Scotch case, *Robertson's Case*, 1 Swin. 93, it was said that full penetration was necessary, otherwise it was *conatus*. But the majority of authority, English and American, is that though some penetration must be shown beyond a reasonable doubt, it need not be full penetration; nothing more than *res in re* being requisite: 3 Inst. 59; *Rex v. Russen*, 1 East P. C. 438; *Rex v. Allen*, 9 Car. & P. 31; *Rex v. Jordan*, Id. 118; *Penn v. Sullivan*, Addis. 143; *Regina v. Lines*, 1 Car. & K. 393; *State v. Le Blanc*, 1 Tread. 354; S. C., 3 Brev. 339; *State v. Hargrave*, 65 N. C. 466; *Stout v. Commonwealth*, 11 Serg. & R. 177; *Commonwealth v. Thomas*, 1 Va. Cas. 307; *Stephen v. State*, 11 Ga. 225; *Waller v. State*, 40 Ala. 325; *Davis v. State*, 43 Tex. 189; *Thompson v. State*, Id. 583; *Word v. State*, 12 Tex. App. 174. But it must be proved that the private parts of the male entered at least to some extent in those of the female: *Rex v. Allen*, 9 Car. & P. 31; *Regina v. Jordan*, Id. 118. It is no longer necessary to prove a rupture of the hymen: *Regina v. Hughes*, 2 Moody, 190; S. C., 9 Car. & P. 752, overruling *Rex v. Gammon*, 5 Car. & P. 321; *Rex v. Russen*, 1 East P. C. 438; *Regina v. Jordan*, 9 Car. & P. 118; *Regina v. McRue*, 8 Id. 641; though at one time it was deemed indispensable: *Rex v. Gammon*, 5 Id. 321. In New York it is held that as the code provides that "any sexual penetration, however slight, is sufficient to complete the crime" of rape, it is a question for the jury as to whether the crime has been committed, and no discussion is necessary or proper on appeal, as to the extent of the penetration: *People v. Crowley*, 6 Northeastern Rep. 384. It is not indispensable that the penetration be proved by the testimony of the prosecutrix; it may be established by circumstantial evidence: See *Regina v. Lines*, 1 Car. & K. 393; *State v. Hodges*, Phill. L. 331, overruling *State v. Gray*, 8 Jones, 170; *State v. Tarr*, 28 Iowa, 397; *Brauer v. State*, 25 Wis. 413. And though it must be proved beyond a reasonable doubt, yet it may be proved by circumstantial evidence, where the defendant, before committing the crime, has reduced his victim to insensibility by blows: *Word v. State*, 12 Tex. App. 174. Mere proof, however, by the prosecutrix of resistance, and then of unconsciousness on her part, without other evidence, will not sustain a conviction: *Weeley v. State*, 65 Ga. 731. But the uncorroborated testimony of a young child as to penetration sustained a conviction in *State v. Lattin*, 29 Conn. 389.

CAPACITY OF DEFENDANT TO COMMIT OFFENSE.—*Boy under Fourteen Presumed Incapable.*—At common law, it is conclusively presumed that a boy under fourteen is incapable of committing rape, or of carnally abusing a girl under ten years of age, whatever, in fact, his physical capacities may be: *Regina v. Jordan*, 9 Car. & P. 118; *Regina v. Brimlow*, Id. 366; S. C., 2 Moody, 122; *Regina v. Philips*, 8 Car. & P. 736; *Rex v. Eldershaw*, 3 Id. 396; *Rex v. Groombridge*, 7 Id. 582; and this rule is followed in some states: *State v. Sam*, Winst. 300; *State v. Pugh*, 7 Jones, 61; *Stephen v. State*, 11 Ia. 225; *Williams v. State*, 20 Fla. 777; but in others it is held that the fact of the accused being under fourteen years of age establishes merely a *prima facie* defense which may be overcome by proof of his capacity in this respect: *Williams v. State*, 14 Ohio, 222; *Hiltabiddle v. State*, 35 Id. 52; *People v. Randolph*, 2 Park. Cr. 174; *People v. Croucher*, 2 Wheel. C. C. 42; *Wagoner v. State*, 5 Lea, 352; see *O'Meara v. State*, 17 Ohio St. 515; *Moore v. State*, Id. 521; *State v. Handy*, 4 Harr. 566.

With regard to assault with intent to ravish, though it has been held that a boy under fourteen is indictable for this offense, and that while there is a presumption of incapacity, the presumption may be overcome by counter-vailing proof, see *People v. Randolph*, 2 Park. Cr. 174; *Commonwealth v. Green*, 2 Pick. 380; the prevalent authority is that the presumption of incapacity is conclusive, and that he cannot be guilty of an assault with intent to commit rape: *Regina v. Philips*, 8 Car. & P. 736; *Rex v. Eldershaw*, 3 Id. 396; *Rex v. Groombridge*, 7 Id. 582; *Regina v. Jordan*, 9 Id. 118; *Regina v. Brimlow*, Id. 366; S. C., 2 Moody, 122; *Williams v. State*, 14 Ohio, 222; *State v. Handy*, 4 Harr. 566; *State v. Sam*, Winst. 300; *State v. Pugh*, 7 Jones, 61.

But though physically incapable, he may, nevertheless, when engaged with others in the commission of the offense, be convicted as principal in the second degree of the crime of rape: *Regina v. Philips*, 8 Car. & P. 736. Or upon evidence of rape, he may be convicted of a simple assault: *Rex v. Eldershaw*, 3 Id. 396; *State v. Pugh*, 7 Jones, 61.

Impotency is also a defense to a charge of rape, since the crime cannot be committed except by a person physically capable: *Nugent v. State*, 18 Ala. 521.

Husband cannot be convicted of rape upon his wife, though he may become guilty as principal in the second degree of a rape upon his wife, by assisting or abetting another man to commit a rape upon her: 1 Hale P. C. 629; *Lord Audley's Case*, 12 Mod. 454; S. C., 3 Howell's St. Tr. 401; 1 Stra. 633. And in Massachusetts, he is liable to be punished in the same manner as the principal felon; and an indictment charging him as principal is valid: *Commonwealth v. Fogerty*, 8 Gray, 489; S. C., 69 Am. Dec. 264, 266; *Commonwealth v. Murphy*, 2 Allen, 165. An indictment for rape need not allege that the woman ravished was not the wife of the defendant: *Commonwealth v. Fogerty*, 8 Gray, 489; S. C., 69 Am. Dec. 264.

ACCESSARIES.—All who are concerned as assisting or abetting the crime, whether a husband, a boy under fourteen, or a woman, may be convicted as principals in the second degree: 1 East P. C. 446; 1 Hawk P. C., Curw. ed., 123, sec. 10; *Audley's Case*, 3 Howell's St. Tr. 401; *Regina v. Orisham*, Car. & M. 187; *Rex v. Folkes*, 1 Moody, 354; *Rex v. Gray*, 7 Car. & P. 164; *Kessler v. Commonwealth*, 12 Bush, 18; *State v. Jones*, 83 N. C. 605; see *State v. Comstock*, 46 Iowa, 265.

WOMAN RAVISHED.—*Puberty* in the female ravished is not a necessary element in the crime. No matter how young the female may be, if she is ravished without her consent, the ravisher is guilty of rape: See 1 Hale P. C.

630, 631; 1 East P. C. 435; 1 Gabb. Crim. L. 833; 4 Bla. Com. 214; 1 Hawk. P. C., Curw. ed., 122, sec. 4; *Rex v. Brasier*, 1 Leach, 4th ed., 199; *Regina v. Neale*, 1 Car. & K. 591; S. C., 1 Den. C. C. 36; *Regina v. Rearden*, 4 Fost. & Fin. 76; *Hays v. People*, 1 Hill, 351; *Stephen v. State*, 11 Ga. 225; *Sydney v. State*, 3 Humph. 478. In many states, statutes are passed making the carnal knowledge of female children under the age of ten or twelve years a crime, whether or not the child consents: See *infra*. Under the statutes of some states, this offense is rape: *Fizell v. State*, 25 Wis. 364; see *Blackburn v. State*, 22 Ohio St. 102.

Want of puberal development on the part of a female over ten years of age may be considered by the jury, not as establishing her inability to consent, but in connection with other evidence to aid in determining whether or not she did or did not in fact consent: *State v. McCaffrey*, 63 Iowa, 479.

Unchastity of the female is no defense to the charge of rape. The crime may be committed upon an unchaste woman or a prostitute as well as upon any other woman: 1 Hawk. P. C., Curw. ed., 122, sec. 7; *Rex v. Barker*, 3 Car. & P. 589; *Pleasant v. State*, 13 Ark. 360; S. C., 15 Id. 624; *Higgins v. People*, 1 Hun, 307; *Pratt v. State*, 15 Ark. 624; *Wright v. State*, 4 Humph. 194. Though, as we shall see, reputation for unchastity may be introduced as tending to impeach the testimony of the prosecutrix.

Wife.—A man cannot be convicted of rape upon his wife: See *supra*, "Capacity of Defendant."

WANT OF CONSENT—RESISTANCE.—There can be no rape where there is consent, however reluctant it may be: *Territory v. Potter*, 1 Ariz. 421; *State v. Burgdorf*, 53 Mo. 65; *People v. Dohring*, 59 N. Y. 374; see *State v. Murphy*, 6 Ala. 765; *Charles v. State*, 11 Ark. 389; *Oleson v. State*, 11 Neb. 276; *People v. Morrison*, 1 Park. Cr. 626; *Anshicks v. State*, 6 Tex. App. 524; *Anderson v. State*, 41 Wis. 430. But it may now be regarded as the settled law, that where the carnal intercourse is effected with a woman without her consent, the offense is rape, although there is no positive resistance of the will: 1 Wharton's Crim. L., sec. 556; *supra*, "Definition;" *Rex v. Fletcher*, Bell C. C. 63; 8 Cox C. C. 131; *Rex v. Camplin*, 1 Car. & K. 746; S. C., 1 Den. C. C. 90; *Osgood v. State*, 25 N. W. 529; *State v. Shields*, 45 Conn. 256; *Commonwealth v. Burke*, 105 Mass. 376. The jury should be convinced beyond a reasonable doubt of the absence of consent: See *Commonwealth v. McDonald*, 110 Id. 405; *Brown v. People*, 36 Mich. 203; *State v. Burgdorf*, 53 Mo. 65.

Force is a necessary element in the crime of rape: *Osgood v. State*, 25 N. W. Rep. 529; *State v. Murphy*, 6 Ala. 765; S. C., 41 Am. Dec. 79, note 84; *Mills v. State*, 52 Ind. 187; but where there is no consent in fact, the offense may be rape, even where there is no resistance, as where the victim is *non compos mentis*, or where drugs and intoxicating drinks are used, or where she is under ten years of age, and incapable of consenting; for in such case there is in the wrongful act itself all the force which the law demands as an element of the crime: *Pomeroy v. State*, 94 Id. 96; S. C., 48 Am. Rep. 146; *Lewis v. State*, 30 Ala. 54; S. C., 68 Am. Dec. 113; 2 Bishop's Crim. L., sec. 1120. There should, however, ordinarily be resistance to the extent of the ability of the victim. There should be the utmost reluctance and the utmost resistance: *Matthews v. State*, 27 N. W. Rep. 234 (Neb.); *People v. Clemons*, 37 Hun, 582. But what is such resistance has relation to the circumstances attending the transaction. If she was overpowered by force, and was unable, for want of strength, to resist actively any longer, or if such resistance was absolutely useless, the crime may have been committed: *People v. Clemons*, Id. 583; *People v. Dohring*, 59 N. Y. 374, 382; *Austine v. Peo*

ple, 110 Ill. 248. If her resistance was *bona fide*, and the utmost, according to her lights, that she could offer, it will be sufficient, and it will not be necessary to show that she opposed all the resistance in her power: *Rex v. Rudland*, 4 Fost. & Fin. 495; *Commonwealth v. McDonald*, 110 Mass. 405; *Crockett v. State*, 49 Ga. 185; *Jenkins v. State*, 1 Tex. App. 346. The prosecution may introduce evidence of the woman's bodily weakness, and of the defendant's bodily strength: *State v. Knapp*, 45 N. H. 148; but it is not permissible to show that the woman knew of the defendant's bad character: *State v. Porter*, 57 Iowa, 691.

Acquiescence from Fear is not Consent. Where the woman is paralyzed from fear and terrified into submission, this submission and failure to make resistance or outcry will not constitute consent, and the offense is rape notwithstanding: 1 Hawk. P. C., c. 41; *Rex v. Rudland*, 4 Fost. & Fin. 967; *Austine v. People*, 110 Ill. 248; *People v. Clemons*, 37 Hun, 581; *State v. Ruth*, 21 Kan. 138; *Pleasant v. State*, 3 Ark. 360; *Wyatt v. State*, 2 Swan, 394; *Sharp State*, 15 Tex. App. 173. Thus where a father by his ferocity established a "reign of terror" in his family, and had carnal intercourse with his daughter, who remained passive because of fear, but gave no consent, the offense was rape: *Regina v. Jones*, 4 L. T., N. S., 154; see also *Regina v. Woodhurst*, 12 Cox C. C. 443; *Sharp v. State*, 15 Tex. App. 173. It is not necessary to show that there was force enough used to create a reasonable apprehension of death: *Walter v. State*, 40 Ala. 325; see, however, *Territory v. Potter*, 1 Ariz. 421. But it should be established that the defendant intended to accomplish his purpose in spite of all resistance: *Rex v. Wright*, 4 Fost. & Fin. 967; *Strang v. People*, 24 Mich. 1; Roscoe's Crim. Ev., ed. 1878, 648.

Acquiescence of Infant.—Where the female is so young as to be unconscious of the nature of the act, her consent or even assistance is no defense: *Rex v. Johnson*, Leigh & C. 632; S. C., 10 Cox C. C. 114; *Rex v. Martin*, 9 Car. & P. 213; S. C., 2 Moody, 123. Certainly less opposition on the part of such a victim is requisite for a conviction, and even where there is no apparent opposition, a conviction may be sustained: *Regina v. Case*, Temp. & M. 318; S. C., 1 Den. C. C. 580; 1 Eng. L. & Eq. 544; *Stephen v. State*, 11 Ga. 225; *State v. Cross*, 12 Iowa, 66; *Regina v. Jones*, 4 L. T., N. S., 154; and see *Regina v. Read*, 1 Den. C. C. 377; S. C., 2 Car. & K. 957; *Regina v. Day*, 9 Car. & P. 722; *Regina v. Lock*, 12 Cox C. C. 244; S. C., L. R. 2 C. C. 10; *Regina v. Page*, 2 Cox C. C. 133; *Hays v. People*, 1 Hill (N. Y.), 351; *Dawson v. State*, 29 Ark. 116; *People v. McDonald*, 9 Mich. 150; *State v. Dancy*, 83 N. C. 608; *Lawrence v. Commonwealth*, 30 Gratt. 345; *State v. Handy*, 4 Harr. 566; *State v. McCaffrey*, 63 Iowa, 479; *Moore v. State*, 17 Ohio St. 521; *O'Meara v. State*, Id. 515. Carnal knowledge of a girl of thirteen of imbecile mind is rape, as she is incapable of giving consent: *Rex v. Fletcher*, 8 Cox C. C. 131; see also *Stephens v. State*, 11 Ga. 225; *State v. Tarr*, 28 Iowa, 397. In New Jersey the rule is applied when the girl is under ten years, and in Virginia and Louisiana where the girl is under twelve: *Cliver v. State*, 45 N. J. L. 46; *Lawrence v. Commonwealth*, 30 Gratt. 845; *State v. Tilman*, 30 La. Ann., pt. ii., 249; see *Territory v. Potter*, 1 Ariz. 421.

Woman non Compos Mentis.—Where the carnal connection is obtained without the consent of the victim, we have seen that the offense is rape; and therefore where the victim is incapable, through mental disorder, of giving consent the crime is rape: See, as to idiocy, *Regina v. Barrett*, L. R. 2 C. C. 81; S. C., 12 Cox C. C. 493; *Regina v. Pressy*, 10 Id. 635; *Regina v. Fletcher*, 8 Id. 134; *Stephen v. State*, 11 Ga. 225; *State v. Tarr*, 28 Iowa, 397; *State v. Crow*, 10

West. L. J. 501; see, as to mania, *Rex v. Charles*, 13 Shaw's J. P. 746; see, as to stupefaction, *Rex v. Ryan*, 2 Cox C. C. 115, and *infra*. But the question whether or not there was actual consent is to be carefully considered, for the victim may be capable of consent, as where the idiocy is not very profound or the mania severe, and if she is capable of consent, and does consent, the offense is not rape, especially where the man is unaware of the woman's mental defects: *Regina v. Pressy*, 10 Id. 635; *Regina v. Ryan*, 2 Id. 115; *Crosswell v. People*, 13 Mich. 427; *Baldwin v. State*, 15 Tex. App. 276; see *Rex v. Fletcher*, L. R. 1 C. C. 39; *State v. Atherton*, 50 Iowa, 189; *Bloodworth v. State*, 6 Baxt. 614; *State v. Crow*, 10 West. L. J. 50. The solution of the question will frequently depend much upon the circumstances of the case, and absence of consent may be sufficiently shown from the character and extent of the mental defects: *State v. Tarr*, 28 Iowa, 397; *Regina v. Connolly*, 28 U. C. Q. B. 317; *Regina v. Barrett*, L. R. 2 C. C. 81; S. C., 12 Cox C. C. 498; *Regina v. Ryan*, 2 Id. 115.

Fraud.—It is not rape where a medical practitioner represents to a patient that coition is necessary for the treatment of her case, and she consents to connection with him, through a belief in his representations; for there is a consent to the act, though fraudulently obtained: *Don Moran v. People*, 25 Mich. 356; *Walter v. People*, 50 Barb. 144; see also *Rex v. Stanton*, 1 Car. & K. 415; *Regina v. Flattery*, 13 Cox C. C. 388; *Pomeroy v. People*, 94 Ind. 96; S. C., 48 Am. Rep. 146. But where connection is obtained by a physician under pretense of making a professional examination of her person, or of performing a surgical operation, there is no consent, and a conviction of rape may be had: *Pomeroy v. State*, 94 Ind. 96; S. C., 48 Am. Rep. 146; *Regina v. Flattery*, 13 Cox C. C. 388; S. C., L. R. 2 Q. B. D. 410; *Rex v. Case*, 4 Cox C. C. 220. In such case, there is in the wrongful act itself all the force which the law demands as an element of the crime: *Pomeroy v. State*, *supra*. But the ignorance and innocence of the victim must be plainly established: *Walter v. People*, 50 Barb. 144; and if the woman consent in the belief that an illegal marriage is legal, upon the fraudulent assertion of the pretended husband, the latter will not be guilty of rape: *State v. Murphy*, 6 Ala. 765; S. C., 41 Am. Dec. 79; *Bloodworth v. State*, 6 Baxt. 614. The criterion is, whether or not the woman consented, not to something else, such as medical treatment, but to the act of coition. A consent to coition, though fraudulently obtained, is, notwithstanding the fraud, a consent, with the presence of which there can be no rape: *State v. Riggs*, 1 Houst. C. C. 120; *Bloodworth v. State*, 6 Baxt. 614; *State v. Burgdorff*, 53 Mo. 65; *Clark v. State*, 30 Tex. 448; *Nair v. State*, 53 Ala. 453; see *Rex v. Williams*, 8 Car. & P. 286; *Rex v. Jackson*, Russ. & Ry. 487; *Regina v. Barrow*, L. R. 1 C. C. 156; *Commonwealth v. Fields*, 4 Leigh, 648; *Pomeroy v. State*, 94 Ind. 96; S. C., 48 Am. Rep. 146; *Stephen v. State*, 11 Ga. 225; *Pleasant v. State*, 3 Ark. 360.

Acquiescence of Married Woman under Belief that Defendant is her Husband.—It is maintained by many authorities that where a woman admits the defendant to sexual connection under the belief that he is her husband, the act does not amount to rape: *Rex v. Jackson*, Russ. & Ry. 487; *Regina v. Saunders*, 8 Car. & P. 265; *Regina v. Williams*, Id. 286; *Regina v. Clarke*, Dears. 397; S. C., 29 Eng. L. & Eq. 542; *Regina v. Barrow*, L. R. 1 C. C. 156; *Regina v. Francis*, 13 U. C. Q. B. 116; *Rex v. Sweeney*, 8 Cox C. C. 223; *Wyatt v. State*, 2 Swan, 394; *Lewis v. State*, 30 Ala. 54; S. C., 68 Am. Dec. 113; *State v. Brooks*, 76 N. C. 1. The contrary has been held in *People v. Metcalf*, 1 Wheel. C. C. 378; *Anonymous*, Id. 381; *State v. Shepard*, 7 Conn. 54. And where she is asleep at the time, and therefore gives no consent, the

offense may be rape: *Regina v. Young*, 14 Cox C. C. 114; *Regina v. Mayers*, 12 Id. 311. But even when she submits under belief that the man is her husband, the same reasoning may apply as in the case of consent obtained by fraud. Where the woman consents to medical treatment, and not sexual connection, the offense is rape. So when she consents to marital intercourse, and not to illegitimate sexual intercourse, such acquiescence should hardly be regarded as consent, though to constitute rape the defendant must have intended, if necessary, to consummate his crime by force, or at least by deceiving the woman: See 1 Wharton's Crim. L., sec. 561; *Rex v. Dee*, 31 Alb. L. J. 43.

Unconsciousness of Female.—Where the prisoner gave the prosecutrix liquor with the intention of exciting her and then having sexual connection with her, and consummated the connection while she was in a state of insensibility, the act was rape: *Regina v. Camplin*, 1 Den. C. C. 89; S. C., 1 Car. & K. 746. And where the prosecutrix was unconscious from intoxication, though not made so by the defendant, he was guilty of rape: *Commonwealth v. Burke*, 105 Mass. 376; see *State v. Stoyell*, 54 Mo. 24; *Commonwealth v. Bakeman*, 13 Mass. 577; *Regina v. Fletcher*, 8 Cox C. C. 131; S. C., Bell C. C. 63, 71. In New York the contrary is held, though the decision rests upon the ground that the statute makes a specific offense of carnal knowledge of an intoxicated woman: *People v. Quin*, 50 Barb. 128. When the connection is had with a woman while she is under the influence of ether or chloroform, a question of medical jurisprudence is involved: 3 Wharton & Stille's Med. Jur., 4th ed., sec. 597. If the woman's will is affected by the anæsthetic so that the connection is had without her consent, though she may be more or less conscious, the act will be rape: Id. Where the woman is *bona fide* asleep, it may now be considered as settled that a conviction of rape may be had: *Rex v. Mayers*, 12 Cox C. C. 311; *Rex v. Lock*, 27 L. T., N. S., 661; S. C., L. R. 2 C. C. P. 10; *Rex v. Young*, 14 Cox C. C. 114; Wharton's Crim. L., sec. 559. But "in all cases of alleged unconsciousness," says Mr. Wharton, "we should keep in mind the old caution, *Non omnes dormiunt qui clausos et conniventes habent oculos.*"

Intent to Use Force, should fraud or stupefaction fail, is essential to the offense: *Rex v. Case*, 1 Den. C. C. 580; *Rex v. Lloyd*, 7 Car. & P. 318; *Rex v. Stanton*, 1 Car. & K. 415; *Rex v. Wright*, 4 Fost. & Fin. 967; *McNair v. State*, 53 Ala. 453; *Dawson v. State*, 29 Ark. 116; *Bradley v. State*, 32 Id. 704; *Taylor v. State*, 50 Ga. 79; *State v. Hagerman*, 47 Iowa, 151; *Commonwealth v. Merrill*, 14 Gray, 415; *State v. Erickson*, 45 Wis. 86; *Hull v. State*, 22 Id. 580; and see cases cited under "Fraud," *supra*.

Consent after Penetration No Defense.—Consent given after the assault, and before penetration, is a good defense to the charge of rape: *Regina v. Hallett*, 9 Car. & P. 748; but after the offense has been completed by penetration, no submission or consent of the woman will avail the defendant: *Whittaker v. State*, 50 Wis. 518; *Brown v. People*, 36 Mich. 203; *Commonwealth v. McDonald*, 110 Mass. 405; *Regina v. Page*, 2 Cox C. C. 133; 1 Wharton's Crim. L., sec. 562 a; 2 Bishop's Crim. L., sec. 1122. And consent after the act is completed is *a fortiori* no defense: Id. It is no defense that the woman subsequently agreed to receive compensation for the injury: *State v. Hammond*, 77 Mo. 157. And where there was evidence tending to show that the prosecutrix consented to the sexual intercourse, but there was also evidence tending to show that she withdrew such consent before the act was consummated, the appellate court will not say that the jury was not warranted in finding that a rape had been committed: *State v. McCaffrey*, 63 Iowa, 479.

PRIOR UNCHASTITY OF WOMAN IS NO DEFENSE.—The fact that the woman was a common prostitute, or the defendant's mistress, is no defense, and the reputation of the prosecutrix for unchastity is no justification or excuse of the offense, though evidence of this character is admissible to impeach her testimony as to the want of consent: 1 Hale P. C. 629; Archb. P. C., by Jerv., 453; *Rex v. Barker*, 3 Car. & P. 589; *Wilson v. State*, 17 Tex. App. 525; *Higgins v. People*, 1 Hun, 307; *Pratt*, 19 Ohio St. 277; *Pleasant v. State*, 3 Ark. 360; *Pleasant v. State*, 15 Id. 624; *Wright v. State*, 4 Humph. 194.

IMPEACHMENT OF PROSECUTRIX BY PROOF OF BAD CHARACTER.—The prior unchastity or evil reputation of the prosecutrix is no defense to rape, and is immaterial, provided a forcible connection without consent is proved. But such evidence is material upon the question of consent as tending to impeach her evidence that the connection was had without her consent: *Wilson v. State*, 17 Tex. App. 525; *Lawson v. State*, Id. 292. The authorities are, however, not agreed upon the question whether or not specific acts of sexual connection with others than the defendant can be given in evidence. In England, and in some of the United States, it is maintained that the prosecutrix may be asked whether she has had prior sexual connection with other persons besides the defendant, but that she will not be compelled to answer the question: *Rex v. Hodson*, Russ. & Ry. 211; affirmed in *Rex v. Holmes*, 12 Cox C. C. 137; S. C., L. R. 1 C. C. 334; *Rex v. Clarke*, 2 Stark. 241; *Rex v. Clay*, 5 Cox C. C. 146; *Pleasant v. State*, 15 Ark. 624; *People v. Benson*, 6 Cal. 221; S. C., 65 Am. Dec. 506; *Wilson v. State*, 16 Ind. 392; *Commonwealth v. Reagan*, 105 Mass. 593; *State v. White*, 35 Mo. 500; *McCombs v. State*, 8 Ohio St. 643; *McDermott v. State*, 13 Id. 332; *Dorsey v. State*, 1 Tex. App. 33; see *Commonwealth v. Kendall*, 113 Mass. 210. In other states, however, the prosecuting witness will be compelled to answer such questions: *People v. Abbott*, 19 Wend. 192; *Brennan v. People*, 7 Hun, 171 (see, however, *People v. Jackson*, 3 Park. Cr. 391; *Woods v. People*, 55 N. Y. 515); *State v. Johnson*, 28 Vt. 512; *State v. Reed*, 39 Id. 417; *State v. Murray*, 63 N. C. 31, overruling *State v. Jefferson*, 6 Ired. 305; *Rogers v. People*, 34 Mich. 345. The authorities also conflict upon the question whether the answer of the prosecutrix to this inquiry may be contradicted or not, some holding that her answer is final: *Rex v. Holmes*, 12 Cox C. C. 137; S. C., L. R. 1 C. C. 334, overruling *Rex v. Robins*, 2 Mau. & Ry. 512; *Rex v. Cockcroft*, 11 Cox C. C. 410; *People v. Jackson*, 3 Park. Cr. 391; and others maintaining that such contradiction is allowable: *Brennan v. People*, 7 Hun, 171; *Strang v. People*, 24 Mich. 1; see 1 Wharton's Crim. L., sec. 568. Evidence that the reputation of the prosecutrix for chastity is bad is admissible, as tending to overcome her testimony as to want of consent: *Rex v. Hodgson*, Russ. & Ry. 211; *Rex v. Barker*, 3 Car. & P. 589; *People v. Abbot*, 19 Wend. 192; *Woods v. People*, 55 N. Y. 515; *Pleasant v. State*, 15 Ark. 624; *Commonwealth v. Kendall*, 113 Mass. 210; *State v. Forshner*, 43 N. H. 89; *State v. Knapp*, 45 Id. 148; *State v. Jefferson*, 6 Ired. 305; *State v. Henry*, 5 Jones, 65; *State v. Daniel*, 87 N. C. 507; *Camp v. State*, 3 Ga. 417; *McCombs v. State*, 8 Ohio St. 643; *McDermott v. State*, 13 Id. 332; *Pratt v. State*, 19 Id. 277; but this reputation must have been borne by her before the act, and not acquired afterwards: *State v. Forshner*, 43 N. H. 89. Evidence of this character, it is held in many cases, must be confined to the general reputation of the prosecutrix for unchastity, and will not be extended so as to include evidence of specific acts, whether sought to be proved by the prosecutrix herself or by others, except that prior acts of illicit intercourse with the accused are admissible as raising an inference that she consented in the case in question: *Wilson v. State*, 17 Tex. App. 525; *Lawson*

v. *State*, Id. 292; *State v. De Wolf*, 8 Conn. 93; S. C., 20 Am. Dec. 90; *Commonwealth v. Harris*, 131 Mass. 336; *Shartzer v. State*, 63 Md. 149; S. C., 52 Am. Rep. 501; *Bessette v. State*, 101 Ind. 85. Other authorities, however, permit evidence of specific acts of unchastity with other men: See cases *supra*; *People v. Benson*, 6 Cal. 221; S. C., 65 Am. Dec. 506; *Shirwin v. People*, 69 Ill. 55; *People v. Abbot*, 19 Wend. 192; *Brennan v. People*, 7 Hun, 171; *Rogers v. People*, 34 Mich. 345. The rule that only evidence of the general reputation of the prosecutrix for unchastity, and not evidence of particular acts, is admissible to impeach her testimony on an indictment for rape, even admitting the general soundness of such rule, should not be applied where the prosecutrix is young, inexperienced, has lived a secluded life, and where her proclivities can be shown only by proof of specific acts of lewdness: *People v. Benson*, 6 Cal. 221; S. C., 65 Am. Dec. 506; see also *Shirwin v. People*, 69 Ill. 55. Evidence of habitual unchastity with men promiscuously is admissible: *Rex v. Martin*, 6 Car. & P. 562; *Woods v. People*, 55 N. Y. 515; *Hall v. People*, 47 Mich. 636; but see *Ritchie v. State*, 58 Ind. 355.

Evidence of prior sexual connection of the prosecutrix with the accused is, however, very material upon the question of consent, and may be proved by the prosecutrix or by others: *Rex v. Martin*, 6 Car. & P. 562; *Rex v. Clarke*, 4 Stark. N. P. 241; *Rex v. Reardon*, 4 Fost. & Fin. 76; *State v. Cook*, 22 N. W. Rep. 675 (Iowa); *People v. Manahan*, 32 Cal. 68; *Pleasant v. State*, 15 Ark. 634; *State v. Jefferson*, 6 Ired. 305; *State v. Forshner*, 43 N. H. 89; *State v. Knapp*, 45 Id. 148; *People v. Abbot*, 19 Wend. 192. Declarations of the prosecutrix to this effect are admissible: *State v. Cook*, 22 N. W. Rep. 675 (Iowa). It is also permissible to show that the prosecutrix was a woman of drunken and dissipated habits: *Brennan v. People*, 7 Hun, 171. And evidence that the prosecutrix had, previous to the alleged rape, given birth to an illegitimate child is competent evidence to prove general reputation for chastity: *Wilson v. State*, 17 Tex. App. 525. But evidence of the bad character of her parents, *State v. Anderson*, 19 Mo. 241, or the declaration of her husband, are not admissible to impeach the prosecutrix: *McCombs v. State*, 8 Ohio St. 643. The prosecution may rebut the evidence of the bad character of the prosecutrix for chastity by introducing evidence of her good character in this respect: *McCain v. State*, 57 Ga. 390; *People v. Tyler*, 36 Cal. 522; *Turney v. State*, 8 Smed. & M. 104; S. C., 47 Am. Dec. 74.

EVIDENCE.—*Corroboration of Prosecutrix*.—The jury should be cautioned against convicting on the testimony of the prosecutrix alone, uncorroborated by other evidence, direct or circumstantial: *People v. Benson*, 6 Cal. 221; S. C., 65 Am. Dec. 506; *People v. Hamilton*, 46 Id. 540; *People v. Ardaga*, 51 Id. 371. Though the credibility of the witness is for the jury: *Boddie v. State*, 52 Ala. 395; *Gazley v. State*, 17 Tex. App. 267; undoubtedly the testimony of the prosecutrix should be corroborated by the circumstances of the case to permit a conviction: 1 Hale P. C. 628, 631; 1 Hawk., c. 41, sec. 2; *Rex v. Gammon*, 5 Car. & P. 321; *Gazley v. State*, 17 Tex. App. 267. In Nebraska it is held that though at common law, where the accused was not permitted to testify in his own behalf, the testimony of the prosecutrix might be sufficient to warrant a conviction for rape, yet under the statute where the accused avails himself of the right to testify, and clearly and explicitly denies the commission of the offense, there must be testimony corroborating that of the prosecutrix, to authorize a conviction: *Oleson v. State*, 11 Neb. 276; *Fisk v. State*, 9 Id. 62; *Matthews v. State*, 27 N. W. Rep. 234 (Neb.). In Iowa, under the statute, there can be no conviction on the testimony of the prosecutrix alone: *State v. McLaughlin*, 44 Iowa, 82. Convictions have, however, been

maintained, though based upon the sole testimony of a child: *State v. Latta*, 29 Conn. 389; and upon that of a woman who was under the influence of ether at the time of the act: 3 Wharton & Stille's Med. Jur., secs. 245, 596, 597; but the failure to produce corroborative evidence when possible to do so will seriously weaken the strength of the prosecution's case: *Barney v. People*, 22 Ill. 160; and the credibility of the testimony of the prosecutrix: *Gazley v. State*, 17 Tex. App. 267. Though the person outraged swears that the crime of rape was actually committed by the prisoner, yet where an attempt is made to impeach her testimony, and her age and the circumstances surrounding the criminal act render her testimony on this subject doubtful, the jury may disregard it, and find the accused guilty of an assault with intent to rape, where the evidence proves such assault beyond doubt: *Jones v. State*, 68 Ga. 760; and a conviction of rape on a child nine years old was set aside where the child's testimony was unsupported except by the fact that she had what might have been gonorrhea, but which, on the other hand, might have been only vaginitis, where the child's accusation was not made for many days, and then was obtained under threats, and where other improbabilities existed: *Gazley v. State*, 17 Tex. App. 267.

Corroborating and Rebutting Evidence.—The fact that soon after the commission of the act the prosecutrix discovered the offense and made search for the offender, that the prisoner fled, that the person of the prosecutrix showed signs of violence, that she made outcry and resistance—these facts, and similar circumstances capable of proof by other testimony and evidence than that of the prosecutrix, should be produced in evidence if possible, and tend to corroborate the testimony of the prosecutrix: *Chambers v. People*, 105 Ill. 409; *Egler v. State*, 71 Ind. 49; *People v. Brown*, 53 Mich. 531; *Lawson v. State*, 17 Tex. App. 292. Such facts as these may be proved as original evidence: *Lawson v. State*, *supra*. It is proper to show by the mother of the prosecutrix that two days after the commission of the offense her daughter's appearance and behavior were such that she insisted on knowing what the matter was, and the daughter told her: *People v. Brown*, 53 Mich. 531. A man who, while standing in *loco parentis* to two girls aged thirteen and fifteen respectively, orders them to sleep with him, and then has connection with them, may be found guilty of rape. Former threats tending to show the fear in which the girls stood of him are properly to be considered as bearing on the case, and on the question of the force used to overcome their wills: *Sharp v. State*, 13 Tex. 171.

On the other hand, if the prosecutrix be a woman of ill repute (see *supra*), if she concealed the injury for a considerable time after she had an opportunity to complain, if she made no outcry though she knew that aid was at hand, if there was no indication of violence about her person—such circumstances are evidence tending strongly to discredit her testimony as to absence of consent: *People v. Benson*, 6 Cal. 221; S. C., 65 Am. Dec. 506, note 509; *Lawson v. State*, 17 Tex. App. 292; *Austine v. People*, 110 Ill. 248; 4 Bla. Com. 213. If, however, a woman when raped is paralyzed by fear, she will not be expected to make resistance or outcry, and if the superiority of the defendant's strength over hers is very great, she might not be able to make effectual resistance. And if the parties are so remote from human help that an outcry would prove unavailing, none need be made, as the law does not require the doing of impossible or useless acts: *Austine v. People*, 110 Ill. 248. So a girl of thirteen, alone in a house with a man who forcibly has connection with her, may be the victim of a rape, although her struggles to resist might have been greater than they were, she being convinced that resistance was useless: *People v. Clemons*, 37 Hun,

680, 584. Where, however, the defendant has attempted to discredit the testimony of the prosecutrix by showing that she had concealed the occurrence for more than a year, and assigned as a reason therefor her fear of the defendant, evidence by the prosecution that the prosecuting witness was deaf and dumb, and that such persons have a sense of inferiority to other people, and as a class are easily intimidated, and that they are credulous and submissive, and that such was the character of the prosecuting witness, is inadmissible: *State v. De Wolf*, 8 Conn. 93; S. C., 20 Am. Dec. 90. A conviction of rape by a father upon his daughter eighteen years of age was set aside, where the girl made no outcry nor complaint for several days, where there was evidence of ill feeling sufficient to make plausible the defense that her story was false, and where testimony was erroneously admitted to show that five days after the rape charged the ground bore marks of a struggle: *Lawson v. State*, 17 Tex. App. 292. An instruction that there is a presumption against the prosecutrix if she failed to resist or cry out, "unless there was good excuse," is bad in not stating what in law, in the particular instance, constituted a "legal excuse," leaving the jury to find if the facts constituting such excuse were proved: *Austine v. People*, 110 Ill. 248. In *State v. Blunt*, 59 Iowa, 468, it was held not to be ground for setting aside the verdict that the district attorney pointed out the defendant before the prosecutrix recognized him.

ADMISSIBILITY OF STATEMENTS OF PROSECUTRIX.—Upon the trial, it is competent to prove, for the purpose of corroborating the testimony of prosecutrix, that soon after the commission of the offense she made complaint of the injury done her: *Rex v. Brazier*, 1 East P. C. 444; *Rex v. Clarke*, 2 Stark. 241; *Rex v. Guttridge*, 9 Car. & P. 471; *Rex v. Megson*, Id. 420; *Rex v. Walker*, 2 Moo. & R. 212; *Rex v. Osborne*, Car. & M. 622; *Rex v. Mercer*, 6 Jur. 243; *Rex v. Wood*, 14 Cox C. C. 46; *Phillips v. State*, 9 Humph. 246; S. C., 49 Am. Dec. 709; *Johnson v. State*, 17 Ohio, 593; *Laughlin v. State*, 18 Id. 99; S. C., 51 Am. Dec. 444; *Burt v. State*, 23 Ohio St. 394; *State v. De Wolf*, 8 Conn. 935; S. C., 20 Am. Dec. 90; *Griffin v. State*, 76 Ala. 29; *Lacy v. State*, 45 Id. 80; *Nugent v. State*, 18 Id. 521; *People v. Clemons*, 37 Hun, 586; *People v. McGee*, 1 Denio, 19; *Baccio v. People*, 41 N. Y. 263; *People v. Croucher*, 2 Wheel. C. C. 42; *Stephen v. State*, 11 Ga. 225; *McMath v. State*, 55 Id. 303; *State v. Jones*, 61 Mo. 232; *Oleson v. State*, 11 Neb. 276; *State v. Niles*, 47 Vt. 82; *Hogan v. State*, 46 Miss. 274. The evidence must, however, be confined to the fact of her having made the complaint. The particulars of the complaint are not admissible. The mere fact that she stated the particulars of the offense, and the name of the ravisher, is admissible, but what she said in these respects is incompetent: Id.; *People v. Clemons*, 37 Hun, 586; *Griffin v. State*, 76 Ala. 29; *Lawson v. State*, 17 Tex. App. 292; *State v. Ivins*, 36 N. J. L. 233; *State v. Knapp*, 45 N. H. 148; *State v. Jones*, 61 Mo. 232; *Pefferling v. State*, 40 Tex. 486; *State v. Gruso*, 28 La. Ann. 952; except that in rebuttal the state may prove the particulars of the complaint when it is necessary to do so to support the veracity, and establish the accuracy of the testimony of the prosecutrix when attacked: *Lawson v. State*, 17 Tex. App. 292; *Griffin v. State*, 76 Ala. 29; *Pleasant v. State*, 15 Ark. 624.

Where the defendant has cross-examined the prosecutrix as to the complaint or statement made by her, with a view to impeach her, and has examined some of the persons who were present at the time the complaint was made, it is permissible for the prosecutrix, for the purpose of sustaining her testimony, to examine other persons who were present at the same time: *Griffin v. State*, 76 Ala. 29. And under similar circumstances the prosecution was allowed to show that after the event she gave a similar account to that

Ind. 267; *Tillson v. State*, 29 Kan. 452; *State v. Hammond*, 77 Mo. 157; *Commonwealth v. Sullivan*, 6 Gray, 477; *Cornelius v. State*, 13 Tex. App. 349. The court will infer the femininity of the person raped without a specific averment of that fact: *State v. Farmer*, 4 Ired. 224; *State v. Hussey*, 7 Iowa, 409; *Taylor v. Commonwealth*, 20 Gratt. 825. The use of the pronoun "her" sufficiently indicates the fact. And it is immaterial that she is called "Francis" in the indictment, if it clearly appears that she was a woman, and that she was often called "Francis" instead of "Frances:" *State v. Hammond*, 77 Mo. 157. The word "female" in an indictment is equivalent to the word "woman:" *Gibson v. State*, 17 Tex. App. 574. The indictment need not aver that the woman was not the wife of the defendant: *Commonwealth v. Scannal*, 11 Cush. 547; *Commonwealth v. Fogerty*, 8 Gray, 489; S. C., 69 Am. Dec. 264; *People v. Estrada*, 53 Cal. 600. In Ohio, however, where the statute provides a severer penalty for the crime when committed upon a daughter or sister than in other cases, it is held that an indictment in an ordinary case of rape must aver that the woman was not the daughter or sister of the accused: *Howard v. State*, 11 Ohio St. 328.

Two Defendants may be Joined as Principals in an indictment for rape: *Rex v. Burgess*, 1 Russell on Crimes, 687; *Strang v. People*, 24 Mich. 1; see *Rex v. Crisham*, 1 Car. & M. 187; *Kessler v. Commonwealth*, 12 Bush, 18. And an indictment was sustained which in one count charged one defendant as principal in the first degree, and the other as accessory, and in the second count charged the latter as principal in the first degree, and the former as accessory: *Rex v. Gray*, 7 Car. & P. 164; see *Folke's Case*, 1 Moody C. C. 354.

CARNAL KNOWLEDGE OF YOUNG CHILDREN.—When the child upon whom the offense is committed is of such tender years as to be unconscious of the nature of the act, her consent is no consent, she being considered incapable of consenting, and the offense is rape at common law: *Supra*, "Consent." By statutes, however, in England and the United States generally, the age under which children are incapable of consenting is fixed usually at either ten or twelve years, and the consent of such children is no defense to the crime: *Fizell v. State*, 25 Wis. 364; *Commonwealth v. Bennett*, 2 Va. Cas. 235; *Lawrence v. Commonwealth*, 30 Gratt. 845; *Stephen v. State*, 11 Ga. 225; *State v. Tilman*, 30 La. Ann., pt. ii., 1249; *Cliver v. State*, 45 N. J. L. 46; *Territory v. Potter*, 1 Ariz. 421; *State v. McCaffrey*, 63 Iowa, 479. Mistake as to the girl's age is no defense: *Lawrence v. Commonwealth*, *supra*.

The indictment under these statutes must, as we have seen, specify the age of the child: *Vide supra*. The indictment need not, however, contain the expressions "by force" and "against the will," etc., as force and lack of consent are not necessary ingredients of the statutory offense: *State v. Black*, 63 Me. 210; *McComas v. State*, 11 Mo. 116; *State v. Jaeger*, 66 Id. 173; *People v. Mills*, 17 Cal. 276. The indictment need not use the word "rape:" *State v. Hart*, 33 Kan. 218. The "carnal knowledge" in the case of young children, under the statute, is construed in the same sense as in reference to rape, the slightest penetration being sufficient: *Rex v. Lines*, 1 Car. & K. 393; *Brauer v. State*, 25 Wis. 413.

In a prosecution for rape committed upon a female child under the age of twelve years, where the prosecuting witness testified on her examination before a justice that the crime was committed in a certain field, but on the trial of the cause in the circuit court testified that it occurred in the defendant's barn, it is error to reject evidence tending to show the motives inducing the change of the *locus* of the crime: *Bessette v. State*, 101 Ind. 35.

THE PRINCIPAL CASE IS CITED to the point that there is no such crime known to the law of Ohio as an assault with intent to carnally know and abuse a child under ten years of age with her consent: *O'Meara v. State*, 17 Ohio St. 518. In *Fisell v. State*, 25 Wis. 369, the indictment was for an assault with intent to "carnally know and ravish by force and against her will," which distinguished the case from the principal case. The principal case is also cited to the effect that English statutes upon the subject of pardons are not in force in Ohio: *Knapp v. Thomas*, 39 Ohio St. 385.

DAVIS v. BARTLETT.

[12 OHIO STATE, 534.]

BURDEN OF PROOF, IN ACTION BY INDORSEE OF NEGOTIABLE NOTE AGAINST MAKER, who pleads that there was no consideration for the note, and that the payee fraudulently transferred it, and that the plaintiff had knowledge of the fraud when he took the note, and who proves the want of consideration and the fraudulency of the transfer as against himself, is upon the plaintiff to show that he received the note before due for a valuable consideration, whereupon the burden shifts back to the defendant to show the plaintiff's knowledge of the want of consideration and fraud; and it is not incumbent upon the plaintiff to prove his ignorance of these facts, in order to entitle him to recover.

INDORSEE MUST PROVE THAT HE RECEIVED NOTE IN USUAL COURSE OF BUSINESS, as well as for value, and before due, after the defendant has proved that it was fraudulently diverted or fraudulently put in circulation by the plaintiff's indorser, *semble*.

INDORSEE OF MERCANTILE PAPER IS PRESUMED TO BE BONA FIDE HOLDER, and entitled to the payment thereof.

ACTION upon a negotiable promissory note, by Davis, the indorsee of the payee, Woolsey, against the makers, Bartlett and St. John. The defendants answered that the note was given for a mower and reaper, which they procured from Woolsey, who agreed that the defendants might take the machine on trial, and if they did not like the machine, or did not find it good, they might return it to him, and he would give up the note; that they were not satisfied with the machine, and did not find it a good one, and they returned it to Woolsey while he still held the note, and demanded it from him, but he refused to deliver it according to his agreement. Fraud on the part of Woolsey was also alleged, consisting in false representations as to the qualities of the machine. And it was charged that the plaintiff was aware of all these facts at the time he took the note. The court charged the jury that if they found that the transfer of the note by the payee to the plaintiff was, as between said payee and the defendants, fraudulent, the burden of proving that the plaintiff acquired it in good faith,

for a valuable consideration, and without any knowledge of the fraud, was on the plaintiff; and that if he failed to make such proof, and it did not appear from all the evidence in the case, the defendants would be entitled to a verdict. To this charge the plaintiff excepted, and verdict and judgment being for the defendants, filed a petition in error.

L. S. and J. T. Beecher, and J. G. Bigelow, for the plaintiff in error.

A. W. Hendry, for the defendants in error.

By Court, SUTLIFF, C. J. There is presented by the record in this case but a single question for our consideration: Upon which party was the burden of proof, under the issue made by the pleadings?

It is here to be observed that the pleadings in the case, the petition and answer, were filed previous to the amendment of April 8, 1857, and under the original provisions of section 84 of the code, which provided that "the only pleadings allowed are the petition by the plaintiff, the answer or demurrer by the defendant, the demurrer or reply by the plaintiff;" and of section 101, that "there shall be no reply, except upon the allegation of a counter-claim or set-off in the answer;" and of section 127, that "every material allegation of the petition not controverted by the answer, and every material allegation of new matter in the answer constituting a counter-claim or set-off, not controverted by the reply, shall, for the purposes of the action, be taken as true; but the allegations of new matter in the answer not relating to a counter-claim or set-off, or of new matter in the reply, shall be deemed to be controverted by the adverse party, as upon a direct denial," etc.

The allegations of the petition, that the defendants made and delivered their negotiable promissory note to Woolsey, and that Woolsey, before it fell due, for a valuable consideration, indorsed and delivered it to the plaintiff, is not denied in the answer. The plaintiff's right to recover is, however, sought to be barred by the allegation of new matter in the answer, constituting a defense. But as we have seen, by the provisions of the code then in force, this matter in bar, so set up in the answer, is to be regarded as traversed by the plaintiff. It was therefore incumbent upon the defendants to prove the matter so pleaded in bar, in order to entitle them to the benefit of it. Thus far, it is apprehended, there can be no two opinions entertained by counsel of the respective parties.

But it is insisted by counsel of the defendants that, although it is true that the burden of proof, under the pleadings, was upon the defendants, and that it was incumbent upon them to show the truth of the matter alleged and relied upon to bar the plaintiff's right of action, yet it is said that the bill of exceptions shows that if the defendants made such proof as showed a defense against the note in the hands of Woolsey, that then the burden of proof was thereby shifted from the defendants upon the plaintiff. And the defendants rely upon both principle and authority to support this proposition.

In the first place, then, how stands the case upon principle? We have seen that the facts constituting the cause of action stated in the petition were not denied by the answer; but the defendants relied upon two substantive facts stated in the answer as a defense: 1. That the note was without consideration in the hands of Woolsey, the payee; and 2. That the plaintiff, at the time he purchased and received the note, had notice of the fact; and both these facts so alleged in the answer are, in law, traversed by the plaintiff. It is admitted that when the case was thus set down for trial upon the single issue made by the denial of the truth of these averments set up in the answer as a bar, it was incumbent upon the defendants to prove the matter so alleged, in order to constitute a bar to the plaintiff's right of action; and neither one of the facts constituting a defense, and both being denied, it was incumbent upon the defendants to prove both facts so averred. It is also shown by the record that, under the charge of the court, evidence was required to be given by the defendants to prove only one of the facts so averred in the answer, to wit, the fact that the note in the hand of Woolsey was without consideration.

But it is said by the defendants that the proof of the failure of the consideration of the note while in the hands of Woolsey, the payee, raises a presumption of the knowledge of that fact on the part of the plaintiff. It is difficult to perceive how this presumption can be made to appear. It stands admitted on the record that the plaintiff purchased the note for a valuable consideration; and as all men are presumed to know the law, the plaintiff must be presumed to know that if the note in the hands of Woolsey was without consideration, it was not collectible, but worthless. How, then, when the admission is that the plaintiff bought and paid for the note, can it be said, in the absence of any proof, and contrary to his denial, that the plaintiff so buying and paying for the note knew it to be

worthless? Such a conclusion is by no means inferable from those facts. Nor is it possible to gain such a deduction, as the presumption of knowledge by the plaintiff from the fact of the existence of the want of consideration for the note. It is not pretended that the evidence at all connects the plaintiff with the transactions between Woolsey and the defendants, in relation to which the note was executed to Woolsey. The answer only avers that the plaintiff purchased the note with knowledge of its want of consideration; and there is shown by the record no avenue of such knowledge to the plaintiff from which it can be presumed. On the contrary, even if it be conceded that the proof clearly showed the fact of want of consideration for the note, while so held by Woolsey, the record shows the cause of action to have been a promissory note, indorsed to the plaintiff, which of itself implies a consideration; and that the same was a negotiable note, which not only imports value, but a willingness on the part of the maker that any third person may purchase it, and a promise to pay to such third person. There is nothing, therefore, in the record to show any circumstances cautioning the plaintiff against making a purchase of the note, or intimating to him any defect or defense which the makers could avail themselves of. It is not such a case as that of an erased, interlined, or altered instrument, of which defect the purchaser may be presumed to have had notice by actual view.

I am therefore unable to perceive that upon principle it can possibly be claimed that the denial of knowledge on the part of the plaintiff is overcome, not by proving his knowledge, but by proving the existence of the fact of failure of consideration, which he so denied knowing, at the time of his buying and paying for the note. By no logical reasoning upon the facts presented by the record can such presumption of knowledge on the part of the plaintiff arise. The conclusion is certainly illogical. The burden of proof would then, upon principle, appear to remain upon the defendants as to this as well as the other fact, which together constitute the defense set up in the answer.

Let us now recur to the authorities relied upon to show that the burden of proving that the transfer of the note by the payee (if fraudulent in his hands) to the plaintiff was in good faith and for a valuable consideration, and without any knowledge of fraud or want of consideration, was on the plaintiff.

The case of *McKesson v. Stanberry*, 3 Ohio St. 156, is doubtless the case most relied upon by the defendants. The facts in that case, as found in the verdict, were that the note on which suit was brought by the second indorsee was negotiable, and received by him from the first indorsee after due, but without notice of the want of consideration, and for a valuable consideration; but that there was no evidence that the first indorsee received the note from the payee before due, or that he gave a valuable consideration therefor; but that the consideration for the note, as between the defendant, the maker, and the payee, had utterly failed, and that the payee had agreed to surrender the note to the maker. It thus appeared that the plaintiff, the second indorsee, had taken the paper dishonored overdue, and he could only avoid the defense which the defendant, the maker of the note, had as against the payee by deriving title from the payee, by the first indorsee, before due, without notice and for valuable consideration. The record showed that the plaintiff had [not] proved such title on the part of the first indorsee, and this court very properly held that the judgment should be in favor of the defendant. The judgment in that case was, therefore, unquestionably correct. The judge, in pronouncing the opinion of the court, says: "Whatever the rule may be in a case where no fraud is shown to have been perpetrated by the original holder in transferring the note, in a case like this, where it is shown that the transaction on the part of the original holder was a positive fraud, we think it lies on the party claiming under such transaction to show that he acted honestly, without a knowledge of the fraud." And the judge refers to the case of *Munroe v. Cooper*, 5 Pick. 412, as particularly in point to sustain this view. If to show that he purchased the negotiable paper, in the usual course of trade, before due, and for a valuable consideration, in such a case, be understood by the judge a fair *prima facie* showing that he acted honestly and without a knowledge of the fraud, the correctness of the remark must be admitted; but if the remark is to be understood as meaning more, it must be regarded, I think, at variance both with authority and correct reasoning.

The case of *Munroe v. Cooper*, 5 Pick. 412, is also relied upon by the defendants in this case as an authority. That was an action by the indorsee upon a negotiable note against the members of a partnership company, by whom the note purported to be made. Two of the three partners appeared

and pleaded the general issue, and on the trial, offered to prove that the note was made by the other partner, who had made default in the case, for his own benefit, and not for the benefit or on account of the company, or with the knowledge of the other partners; but as the defendants did not offer to prove also that the note was due when indorsed to the plaintiff, or that he had knowledge of the facts, the judge, on the trial of the case, was of the opinion that the facts so proposed to be proved did not amount to a defense, and excluded the proof. The supreme court, in revising this opinion, by Wilde, J., held that the defendants had the right to prove, if they could, that fraud was practiced in the inception of the note, or that it was fraudulently put in circulation. And the judge adds: "This fact being established, will throw upon the plaintiff the burden of proof to show that he came by the possession of the note fairly and without any knowledge of the fraud." There can be no doubt that the judgment of the supreme court, in this case also, was strictly correct; and if by burden of proof to show possession of the note fairly and without knowledge of the fraud be only meant that upon defendants proving the note to have been fraudulently executed and put in circulation, that it was incumbent upon the plaintiff to prove that he received the negotiable paper before due, in the usual course of trade, upon a valuable consideration, the remark of Judge Wilde is strictly correct, and consonant with the authorities to which he refers; but if his remark is to be understood as intimating that the rule in such a case imposes any further burden upon the plaintiff than to prove he purchased and received the transfer of the negotiable paper before due, in the usual course of trade, *bona fide* and upon a valuable consideration, it is not only not sustained by but is opposed to the authorities to which he refers.

In the case of *Vallett v. Parker*, 6 Wend. 615, the facts were quite similar to those in the case of *Munroe v. Cooper*, 5 Pick. 412. In pronouncing the opinion of the court in the case, Savage, C. J., says: "Whatever doubts may have heretofore existed, I take it to be well settled that as between the original parties to a promissory note, the defendant may show either the want of consideration or the illegality of it. But when a negotiable instrument has passed in the ordinary course or business into the hands of a *bona fide* holder for valuable consideration, and without notice of the consideration, the general rule is that the defendant cannot avail himself of any such defense."

In the case of *Thomas v. Newton*, 2 Car. & P. 606, an action by the indorsee against the acceptor of a bill of exchange—defense, that the bill was accepted for stock-jobbing differences, and no consideration for the bill—Lord Tenterden, C. J., said: “If the defendant shows that there was originally no consideration for the bill, that throws it on the plaintiff to show that he gave value for it, or that value was given for it by Dandridge, the prior indorsee.”

Another case to which we are referred by the defendants in support of their position, that it was incumbent upon the plaintiff as indorsee to prove not only that he had paid value for the note and received it before due in the ordinary course of business, but also that he in fact had no notice of the want of consideration, is the case of *Heath v. Sansom*, 2 Barn. & Adol. 291; S. C., 22 Eng. Com. L. 128. *Assumpsit* by plaintiff as indorsee against defendants as makers of a negotiable promissory note; defense, that the note had been given by one of the members of the firm, in the name of the firm, for his own private debt to the payee, without the consent or knowledge of the other members of the firm, and received by the payee in fraud of the right of the defendants, the other members of the firm. Lord Tenterden, C. J., in pronouncing the opinion, after saying the court was satisfied of the goodness of the defense, as against the payee, adds: “And this is a stronger case than the ordinary one, in which indorsees have been put to prove value given by reason of the circumstances under which an acceptance or note was obtained, because here the indorsee chooses to bring his action against the makers, who are unknown to him, rather than sue the indorser (the payee) whom he knows, and from whom he took the note.” Littledale, J., in his opinion, said: “It has been frequently held that when a note or acceptance of a bill has been obtained by fraud, loss out of the owner’s hands, or duress, the indorsee is bound to show that he gave value, and in some instances even that he became holder *bona fide*, and not under circumstances of suspicion. It may be laid down, as a general rule, that if the note or acceptance were taken under such circumstances that the indorser himself could not recover, the indorsee must prove that he became so for a good consideration, though no notice be given him to produce such evidence.” Parke, J., in his opinion, remarked as follows: “I have always understood that an indorsement must be taken *prima facie* to have been given for value, and that the proof, at least, of circumstances tending

to throw suspicion on such indorsement lies on the party disputing its validity, before the indorsee can be called upon to prove that he gave value for the bill. . . . When the note or acceptance has been obtained by felony, by fraud, or by duress, it has been usual to require proof of valuable consideration on the part of the indorsee; and I do not dispute the propriety of that usage, as any one of those facts raises some suspicion of the title of the holder. But I am by no means satisfied that the same rule can be applied to all cases where an acceptance or note has been given without consideration. . . . The simple fact of want of consideration between the acceptor and drawer, or maker and payee, affords no inference that the holder received the bill or note *mala fide*, or without consideration." Patterson, J.: "As at present advised, I think the general rule of practice on this subject has been correctly stated; and that where a note or acceptance has been given under such circumstances that the original payee could not recover on it, the indorsee may fairly be called upon to show how it came to his hands, and is not entitled to a previous notice."

The case of *Ball v. Allen*, 15 Mass. 433, was an action by the holder of an order payable to bearer against the drawer, in which it was held that inasmuch as the writing did not purport to be for value, and no particular person was named as drawee, no action thereon could be maintained against the person subscribing it, without showing that he came fairly by it for a valuable consideration.

The case of *Holme v. Karsper*, 5 Binn. 469, was an action by the indorsee of a negotiable note, obtained by the plaintiff before it fell due against the payee as indorser; defense, that the note was never in fact put in circulation by the payee; that the note was taken out of bank by the payee, his name having been written on it for the purpose of collection in bank, where deposited, and by arrangement with the maker, sent to him to be canceled, without having first erased his indorsement on the note. Tilghman, C. J., in delivering the opinion of the court, says: "In the first instance, it is presumed that every man acts fairly. It lies on the defendant, therefore, to show some probable ground of suspicion before the plaintiff is expected to do anything more than produce the note on which he founds his action. But this being done, it is reasonable that the holder should be called on to rebut the suspicions. All that is asked of him is to show that he acted fairly, and paid value."

The foregoing are the principal authorities referred to by counsel of defendants to sustain the rule expressed in the charge of the court.

It will be difficult, I apprehend, to perceive any apparent conflict in the authorities referred to by the plaintiff, taken together, and those cited by the defendants' counsel, with the single exceptions of the cases in *McKesson v. Stanberry*, 3 Ohio St. 158; and *Munroe v. Cooper*, 5 Pick. 412. The case of *Smith v. Martin*, 2 Mee. & W. 304, cited by plaintiff's counsel, is hardly a stronger case in favor of plaintiff than the English cases already referred to, cited by counsel of defendants. It was an action by an indorsee against the maker of a promissory note, indorsed and delivered by the defendant to F. & Co., who indorsed it to G. V. & Co., who indorsed it to plaintiff. Plea, that the said several indorsements were in blank, and that after the indorsement of the note by defendant to F. & Co., and before the delivery thereof to the defendant, the note was in the hands of G. V., who was the owner, and while the note was so in his hands as owner, it was by consent of G. V., by an order of *nisi prius*, ordered that the note and the claim of G. V. therein should be referred to arbitration; and that the note was delivered by said G. V. to the plaintiff after the making of said order, and before any award was made in the premises, and in violation of good faith, and in fraud and contempt of said order; and that the plaintiff took the said note with full knowledge of the premises. Replication, that the plaintiff had not, at the time when he so took the said note, any knowledge of the premises in the plea mentioned. At the Middlesex sittings, after Michaelmas term, it was contended on the part of the defendant, on the authority of *Bingham v. Stanley*, 1 Gale & D. 237, that inasmuch as the replication admitted a fraudulent delivery of the note to the plaintiff by G. V., the plaintiff was bound to begin, and in the first instance to prove consideration. The lord chief baron, however, was of the opinion that even though the fraud of G. V. was admitted by the replication, still, as the note was not therefore absolutely void as against the plaintiff, but only capable of being made so by proof of his knowledge of the fraud, that fact was to be proved affirmatively by the defendant. The defendant failing to prove knowledge on the part of the plaintiff, the verdict and judgment were for the plaintiff.

At the Hilary term, in the court of exchequer chamber, counsel of defendant moved for a new trial, on the ground of

misdirection of the judge in not having called upon the plaintiff to prove consideration for the note. But after full argument, the court refused the rule. Lord Abinger, C. B., Alderson, B., and Gurney, B., each expressed an opinion against allowing the rule. The reasons governing two of the judges, however, would seem to be an unwillingness to regard the replication as admitting the fraudulent transfer of the note by G. V. And their holding in refusing the rule was admitted by them to be opposed to the holding of the queen's bench, in the case of *Bingham v. Stanley*, 1 Gale & D. 237. But both cases seem to have turned rather upon the question of pleading, whether the replication was an admission by plaintiff, equivalent to proof on the part of defendant, of a fraudulent transfer of the note.

But it is unnecessary to consider the authorities more at length in detail. The almost uniform holding of the courts to be deduced from the general current of decisions, English and American, is, that the indorsee of mercantile paper is presumed to be the *bona fide* holder, and entitled to the payment thereof. And this presumption entitles such holder to a recovery in an action brought upon the paper, unless there be alleged and admitted, or proved on the part of the defendant, some fact or facts overcoming such presumption in favor of the right of the plaintiff to recover judgment thereon. Thus if, in face of such presumption in favor of the plaintiff's right to recover as the *bona fide* holder of the paper, the defendant avers that the bill of exchange upon which suit is so brought by the indorsee was fraudulently diverted from the purpose for which drawn, by the plaintiff's indorser, with full knowledge on the part of the plaintiff at the time of receiving said paper, the defendant states facts sufficient to overcome the presumption in favor of the plaintiff's right to recover, and to constitute a good defense, when admitted by the plaintiff or proved by the defendant. But if not admitted by the plaintiff, the bare averment of the facts by the defendant cannot at all affect the plaintiff's presumptive right of recovery, until established by proof—or at least, so far established by proof as to show a good defense to the paper previous to its transfer to the plaintiff.

The weight of authority is to the effect that when the defendant has proved the paper to have been fraudulently diverted, or fraudulently put in circulation, the plaintiff must then take up the case and prove the transfer to have been

made to himself before due for a valid consideration. Many of the cases seem to favor the idea that it is also incumbent upon the plaintiff to prove that he obtained the paper in the usual course of business or trade, in order to restore the presumption of his right to recover. But it is unnecessary to here determine how the weight of authority stands upon this point. But when we recur to the general current of the cases, we find the presumption in favor of the plaintiff's right to recover; and the necessity of the fact of plaintiff's knowledge of the fraudulent diversion, or matter of defense, as well as of its existence, to constitute a perfect plea in bar, to be generally recognized. The *bona fide* of the plaintiff's right of recovery upon the paper is, therefore, the question in issue between the parties. If the plaintiff had notice, either by the paper being overdue or put into his hands without consideration, or in any other way notified of the defendant's right to refuse payment, he cannot be regarded a *bona fide* holder of the paper acquired under such notice. There may be cases, therefore, where the buying the paper and paying value for it may be attended with such circumstances as might not, without the additional proof of the purchase being in the ordinary course of business, be sufficient to restore the presumption in favor of plaintiff's right to recover upon the paper.

But it is certain that it cannot be maintained, either upon authority of the cases, English or American, that from the fact of the defendants proving a fraudulent diversion or transfer of the paper, it then becomes incumbent upon the plaintiff to prove, not only payment of value and a purchase in the usual course of trade, but also his own ignorance of the fraudulent diversion or transfer. This would be to require the plaintiff, after having traversed both the averment of fraud and knowledge constituting the defendants' plea in bar, in the absence of any proof on the part of the defendants of its truth, after denying it upon the record, to disprove it also. The proposition is evidently unsustained by authority, and opposed to the general rules of pleading. And we have already seen that it cannot be sustained upon principle and reason.

We think the district court erred in holding that it was incumbent upon the plaintiff to prove, not only that he purchased the note before due and in the usual course of trade and for a valuable consideration, but that he made the purchase without knowledge of the fraud of the payee. The proof of want of knowledge was not incumbent upon the plaintiff. The judg-

ment of the district court must be reversed, and the cause remanded to that court.

Judgment accordingly.

PECK, GHOLSON, BRINKERHOFF, and SCOTT, JJ., concurred.

BURDEN OF PROOF IS UPON PLAINTIFF WHEN FRAUD OR IRREGULARITY IS SHOWN in the inception of a negotiable instrument, to show that he received it in good faith for value: *Paton v. Coit*, 72 Am. Dec. 53, note 62; *Chipp v. County of Cedar*, 68 Id. 678, note 695, 696, citing prior cases; *Fuller v. Hutchings*, 70 Id. 746. The principal case is cited to the point that under a defense of want of consideration for the note sued on by an indorsee, the defendant must first show the want of consideration, and then the plaintiff must show that he purchased the note before due, in the usual course of trade, and for value; upon showing which the burden shifts to the defendant to establish the fact that the plaintiff received the note with notice of its infirmity: *Tod v. Wick*, 36 Ohio St. 390.

HOLDER OF NEGOTIABLE PAPER IS PRESUMED TO BE BONA FIDE HOLDER until something is shown in disparagement of his title: *Emanuel v. Whit*, 69 Am. Dec. 385, note 386. Gross negligence is not alone enough to destroy the title of a holder in due course for value, but a case of bad faith in taking the security must be made against him in order to defeat his claim on the ground of equities between the original parties: *Johnson v. Way*, 27 Ohio St. 381, citing the principal case.

GOSHEN TOWNSHIP v. SHOEMAKER.

[12 OHIO STATE, 624.]

WHERE ALL PARTIES CONCERNED IN ALLEGED ILLEGAL TRANSACTION HAVE PARTICIPATED IN THAT ILLEGALITY, though it may be available as a defense, it by no means follows that it can be made ground for affirmative relief, which is dependent upon the discretion of the court, such as the rescission of an executed contract, though there may be exceptions where the law offended has been made to prevent oppression, and the oppressed party is seeking relief, or where public policy will be advanced by allowing the relief.

LACHES AND ACQUIESCENCE WILL PREVENT PERSON FROM SEEKING, IN EQUITY, RESCISSION OF CONTRACT, on the ground of alleged illegality in which both parties have participated, though such acquiescence will confer no right on the other party.

TRUSTEES OF TOWN ARE NOT ENTITLED TO AFFIRMATIVE RELIEF OF RESCISSION OF CONTRACT of subscription to stock of railroad company, and of the cancellation of the bonds issued by them in payment for the stock, on the ground that the subscription was made and the bonds issued under a misapprehension or misconstruction of, and not in accordance with, the statute authorizing these acts, where the bonds have been delivered to the company, and assigned by them, and the interest accruing thereon has been paid for several years without objection, and there is no charge of fraud against the defendants; though the illegality of the bonds might be available and effectual as a defense against any holder.

RESERVATION IN BONDS ISSUED BY TOWNSHIP FOR RAILROAD STOCK, that township may require company to take the stock subscribed, and redeem bonds, cannot be enforced against those to whom the company may assign the bonds.

PETITION filed by the trustees of Goshen township against the Springfield, Mt. Vernon, and Pittsburg Railroad Company, and R. M. Shoemaker. The petition showed that the trustees were authorized to subscribe stock in the railroad company, under certain acts of the general assembly, and upon certain conditions prescribed in those acts. The petition sets forth the manner and form in which the subscription was made and paid for by bonds issued by the then trustees of the township, and alleges that these acts were not done in accordance with the statute, but were invalid and illegal, and imposed no obligation upon the township. The defendant Shoemaker, it was alleged, held four thousand five hundred dollars of the bonds, and had actual notice of the manner in which the stock was subscribed and the bonds issued. One of the conditions of the issuance of the bonds, and shown upon the face thereof, was, "after four years the township to have the option whether to keep the stock, or to require of the railroad company to take the stock and redeem the bonds." The bonds were issued August 3, 1852, bearing date March 1, 1852, and all the interest accruing up to March 1, 1856, had been paid. The last payment of interest was made April 2, 1858, and was made under protest as to the legality of the bonds. At the same time, the plaintiffs demanded of Shoemaker that he take from them stock to the amount of the bonds, and surrender the bonds; but he refused to do this, and a notice was served upon the company, demanding that it take the stock and redeem the bonds, which were stated to be illegal and void; but the company failed to do this. The company was unable to make the road, and was wholly insolvent. The bonds had been duly assigned and guaranteed by the railroad company, to which, or its assigns, they were payable. The above facts were alleged in the petition, which prayed that the bonds held by Shoemaker might be delivered up to be canceled; and if that relief could not be granted, that the railroad company might be decreed to take the stock and redeem the bonds, and that Shoemaker be decreed to take payment of the bonds held by him in the stock at par. The defendants demurred to this petition, on the ground that it did not state facts sufficient to constitute a cause of action. The questions arising upon this demurrer were reserved for the decision of this court.

A. G. Thurman and I. Corwen, for the plaintiffs.

Mason, and Bowman and Mason, James Murray, and R. B. Warden, for the defendants.

The COURT. A question arises in this case, preliminary to the examination of the legal questions presented upon the construction of the acts of the general assembly, authorizing a subscription of stock by the trustees of Goshen township in the Springfield and Mansfield Railroad Company. The plaintiffs, in effect, ask the court to rescind the contract between the railroad company and the trustees, which has been executed by a subscription of stock and the payment therefor, in the bonds of the township. The bonds have not only been delivered, but have been assigned with a guaranty of their payment by the railroad company, and the interest accruing upon them for several years has been paid without objection. Under these circumstances, we do not think that the plaintiffs are in a position to ask the extraordinary relief of the rescission of the contract, and the cancellation of the instruments they have issued, but if they are not bound for the payment of the bonds, must await a decision to be made in a proceeding, or action in which they occupy the position of defendants.

Where all the parties concerned in a transaction alleged to be illegal have participated in that illegality, though it may be available as a defense, it by no means follows that it can be made the ground for affirmative relief, dependent, as is the relief asked in this case, upon the discretion of the court. There may be exceptions, where the law offended has been made to prevent oppression, and the oppressed party is seeking relief, or where public policy will be advanced by allowing the relief: *Adams on Equity*, 175; *Reynell v. Sprye*, 1 DeG. M. & G. 660, 679. An application for relief of this kind will also be affected by laches and acquiescence. Such acquiescence, while it may confer no right on the other party, will preclude the plaintiff from relief in a court of equity: *Hilton v. Earl of Granville*, 1 Cr. & P. 283, 292.

We see no good reason why the plaintiffs should escape from the application of these rules. These bonds, if illegal, are so, not because they are prohibited by any statute, but in consequence of a misapprehension or misconstruction of certain acts of the general assembly. For we do not understand that there is any charge of fraud against either the railroad company or the defendant Shoemaker. Fairness and good

faith on their part are consistent with every allegation in the petition. It may be that they, as well as the trustees and the electors of Goshen township, were mistaken in their construction of the powers conferred by the acts of the general assembly. But there is no legal reason why, in the absence of fraud or undue means, one party should be held to a more perfect knowledge of the law than another.

That acts of acquiescence on the part of the trustees, and even the electors of the township, will affect the plaintiffs, is shown by the cases of *Garrett v. Van Horne*, 7 Ohio St. 327; *Smead v. Union Township*, 8 Id. 394. We do not understand those cases as deciding that acts of acquiescence will bind the township in its corporate capacity, if the claim alleged be in its inception illegal—if there be a defect of power; but the cases show that townships, like individuals, may be affected by acts of acquiescence, in cases where such acts may properly have effect. We think they will have their proper effect in precluding a resort to the remedy adopted in this case. If the right of defense to the bonds has not been affected by the acts of acquiescence, because founded on illegality or want of power, we see no reason to suppose that such a defense would not be effectual and available against any holder. Not only do these bonds show to any one who may become their holder full notice of their origin, but no township in this state could issue such instruments without special authority from the general assembly, and any party asserting a liability on them would be bound to show such authority.

The prayer in the petition for a specific performance of the condition, which is shown on the face of the bonds, we think, is not sustained by a fair construction of the terms of that condition. It contemplates a disposal of the bonds by the railroad company, and binds the railroad company in the contingency stated, to redeem them, that is, to pay the holders, and so exonerate the township; but it does not bind the holders to accept stock in payment, though it might to receive payment before their maturity. The prayer is, that Shoemaker may be required to deliver up the bonds on receiving their amount in stock. There is no prayer that the railroad company may be required to redeem by payment. The railroad company being, as stated in the petition, wholly insolvent, no such relief is asked, and certainly could not be expected beyond the idle form of rendering a judgment.

Demurrers to petition sustained.

LACHES AS BAR TO RELIEF IN EQUITY: *Drinkard v. Ingram*, 73 Am. Dec. 250, note 253.

RESCISSION OF CONTRACT IN EQUITY, WHEN GRANTED: See *Hunt v. Turner*, 60 Am. Dec. 167; *Salmon v. Hoffman*, 56 Id. 322; *Kirby v. Harrison*, 59 Id. 677, and notes.

THE PRINCIPAL CASE IS CITED to the point that the legislature has authority to grant to counties, cities, towns, and townships the power to subscribe to the stock of railroad corporations: *Walker v. City of Cincinnati*, 21 Ohio St. 43. In *Hopple v. Brown Township*, 13 Id. 331, it was held that there was no such acquiescence or conduct on the part of the tax-payers of the township as would validate bonds issued without authority, even if it were conceded that that could in such a case constitute an answer to the want of power to issue the bonds, and the court expressed itself as satisfied with the principles of law expressed in the principal case. In *Shoemaker v. Goshen Township*, 14 Id. 586, which was a case between the same parties, it was again held, following the principal case, that the reservation in the bonds of the contingent right on the part of the township to require the railroad company to take the stock subscribed, and redeem the bonds issued by the township, was a contract between the township and the company alone, and could not be enforced against those to whom the company assigned the bonds.

NIXON v. NASH.

[12 OHIO STATE, 647.]

INTEREST OF PARTNER IN TANGIBLE PROPERTY OF FIRM IS LIABLE TO SEIZURE UPON EXECUTION in favor of his separate creditor.

LEVY AND SALE ON EXECUTION OF PARTNERSHIP PROPERTY FOR INDIVIDUAL DEBT OF ONE PARTNER must be of an undivided interest in the chattel corresponding to the debtor's share in the firm; but the purchaser at the sale acquires only the beneficial interest of the debtor partner therein.

EACH PARTNER HOLDS HIS INTEREST IN JOINT PROPERTY SUBJECT TO TRUST for the partnership creditors and the claims of his several copartners, so that the beneficial interest of each is his residuary share after the partnership accounts are settled, and their rights *inter sese* adjusted.

SEPARATE CREDITOR OF PARTNER WHO HAS LEVIED EXECUTION ON TANGIBLE PROPERTY OF PARTNERSHIP may file a petition in equity against the other partners, before a sale upon execution for an account of the partnership, and the ascertainment of his debtor's interest in the property seized.

UPON LEVY OF EXECUTION BY CREDITOR OF INDIVIDUAL PARTNER upon tangible property of firm, it is the right of the creditor and of the other copartners, should either desire, to invoke the equity powers of the court to adjust the partnership business, and to stay proceedings under the execution, till the beneficial interest of the debtor partner in the goods seized has been ascertained; but if they do not so elect, the officer must sell the apparent interest of the debtor in the chattels levied on, and upon such sale redeliver the same to the other partners and the purchaser, who will then be owners in common, subject to a lien in favor of the other partners and the joint creditors, upon the interest of the debtor partner in the hands of the purchaser, for any balance due upon final adjustment of the partnership account.

SURT by Nixon & Chatfield against Nash and Atkison. The petition sets forth that plaintiffs recovered judgment against Nash, and that execution was issued upon the judgment and levied upon the interest of Nash in the goods and chattels of a book-store owned and managed by Nash and Atkison as partners; that after the levy the defendants dissolved partnership, agreeing that Atkison should become the owner of all the joint assets, and that the partners at the time had full knowledge of the previous levy of the plaintiffs; and that Nash had no other property subject to levy for satisfaction of the judgment. The petition prays for the appointment of a receiver; that an account may be taken of the interest of said Nash in the said book-store at the time of the levy; and that the same or so much thereof as may be necessary be sold to satisfy the said judgment, interest, and costs. The defendants demurred, on the ground that the petition did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and judgment rendered for the defendants, to reverse which this petition in error is filed by the plaintiffs.

V. M. Firor, for the plaintiffs in error.

Perry and Nash, for the defendants in error.

By Court, PECK, J. The petition was filed in this cause by a judgment creditor of one member of a mercantile firm to enforce a lien created by the levy of an execution upon his debtor's interest in the firm prior to any sale upon execution of the interest so levied on.

The demurrer to the petition raises several questions, the most important of which are: 1. Whether the separate creditor by such levy acquires at law any lien upon his debtor's interest in the joint assets; and if so, its nature and extent? 2. Whether such separate creditor, after the levy and before the sale, can invoke the equity powers of the court to ascertain the extent of the debtor partner's interest in the goods thus seized?

Each partner has a legal interest and right of possession as to all the joint assets, and it would be strange, indeed, and contrary to public policy, if such an interest could not be seized and subjected to the payment of any judgment against him. To hold otherwise would place it in the power of an unscrupulous debtor, by entering into such relations to screen his property, or to so hedge the approaches to it, as to render it almost, if not altogether, inaccessible to his creditor. This,

justice and sound policy will not permit, and accordingly we find it universally admitted that the interest of a partner in the tangible property of a firm is liable to seizure upon execution, in favor of his separate creditor: *Mayhew v. Herrick*, 7 Com. B. 229; S. C., 62 Eng. Com. L. 240; *White v. Woodward*, 8 B. Mon. 485; *Phillips v. Cook*, 24 Wend. 389; *Scrugham v. Carter*, 12 Id. 131; *Walsh v. Adams*, 3 Denio, 125; *Church v. Knox*, 2 Conn. 514; *Newhall v. Buckingham*, 14 Ill. 405; *Whitney v. Ladd*, 10 Vt. 165; *Knox v. Summers*, 4 Yeates, 477; *Moore v. Sample*, 3 Ala. 319; *Burgess v. Atkins*, 5 Blackf. 337; *Deal v. Bogue*, 20 Pa. St. 228 [57 Am. Dec. 702]; *Place v. Sweetzer*, 16 Ohio, 142; Collyer on Partnership, secs. 822 et seq.; Story on Partnership, secs. 261 et seq.; 1 Parsons on Contracts, secs. 176 et seq.

But while the right to levy is thus conceded, the authorities differ widely as to the course to be pursued by the creditor and the officer executing the writ.

In some cases, the right of the officer to take the goods, even temporarily, out of the immediate possession and control of the other partners, is denied, and in others a temporary interruption of their possession, in order to take an inventory, is reluctantly permitted; still, the decided weight of authority seems to be, that the officer may, and for his own security and that of the execution creditor should, take possession of all the chattels levied on, and after the sale of the debtor's interest therein, redeliver the same to the other partners and the purchaser, who are said to be tenants in common of the chattels so sold.

The levy and sale must be of an undivided interest in the chattel, corresponding to the debtor's share or nominal interest in the firm; but it is also well settled that the separate creditor or the purchaser at such sale, acquires only the beneficial interest of the debtor partner in the articles sold. Each partner holds his interest in the joint property, subject to a trust for the partnership creditors, and the claims of his several co-partners; so that the beneficial interest of each is his residuary share after the partnership accounts are settled, and their rights *inter sese* adjusted.

The seizure and sale is, *pro tanto* at least, a dissolution of the partnership, and calls for an adjustment of the joint business. If the partnership is then entirely solvent, the beneficial interest of the debtor in the articles sold may equal his proportionate share in the joint business; but if not so, a part,

if not the whole, of his interest therein may be required to liquidate the balance due from him on the final adjustment.

Inasmuch as the levy and sale must be of an undivided part of the chattel, equal to the debtor's original interest in the joint business, while the purchaser acquires only the present beneficial interest of the debtor, it is manifest that the uncertainty as to the extent of that interest, must seriously embarrass the sale. It would, doubtless, be much better for all parties, if the beneficial interest of the debtor could be ascertained before the property is offered for sale, especially if there is any reason to apprehend that the beneficial interest of the debtor is much disproportioned to his apparent interest.

Courts of law are not provided with suitable means for adjusting the complicated accounts of a partnership (Story on Partnership, sec. 262), though it seems that the court of king's bench has, in some instances, directed the taking of such account previous to a sale: Collyer on Partnership, sec. 827.

The separate creditor acquired, by his levy, a lien upon the legal interest in possession of his debtor, but owing to the conflicting rights and interests of the other partners, that lien cannot be precisely ascertained, nor adequately enforced at law. On general principles, then, as well as in analogy to the relief granted in equity, in cases of conflicting liens upon real estate, requiring the adjustment of complicated accounts and a marshaling of assets, it would seem that either party, the creditor or the other partner, should have the right, by petition, to require settlement of the partnership account, and an ascertainment of the beneficial interest of the debtor partner, before that interest is subjected to a sale.

Judge Story, in section 263 of his treatise on partnerships, while treating of the levy of an execution by the creditor of one partner upon that partner's interest in the joint property, says: "The judgment creditor himself may file a bill against the other partners for the ascertainment of the quantity of that interest, before any sale is actually made under the execution."

It was held, indeed, in *Moody v. Payne*, 2 Johns. Ch. 548, that one copartner could not file a bill against the separate creditor of his copartner, who had levied an execution upon that partner's interest in the joint property, for an account of the partnership, and to enjoin a sale until the taking of such account. Judge Story, in commenting upon this decision, in section 264 of his said treatise, arrives at the conclusion, and

we think correctly, that the decision in *Moody v. Payne*, 2 Johns. Ch. 548, is unsound in principle, and not sustained by the authorities.

In *Place v. Sweetzer*, 16 Ohio, 142, it was also held that a bill might, in such case, be filed by a partner against the separate creditor of a copartner, to restrain a sale upon execution, until an account could be taken of the partnership, and the beneficial interest of the debtor partner ascertained.

In *Sutcliffe v. Dohrman*, 18 Ohio, 181 [51 Am. Dec. 450], the court reviews and fully approves of the decision in *Place v. Sweetzer*, 16 Id. 142, as correct in principle; and upon page 186 says that the creditor also had an equal right to appeal to a court of chancery, by bill, to have his rights determined in relation to the property, instead of resorting to a sale under the execution.

It is clear, we think, upon principle and upon authority, that the levying creditor, in the case at bar, having acquired a lien by the seizure, in execution, of his debtor's interest in the tangible property of the firm, might properly file his petition against the other partner for an account of the partnership, and the ascertainment of his debtor's interest in the property seized, before a sale upon execution.

The rule in Ohio, at least, seems therefore to be, that upon such levy being made, it is the right of the creditor and of the other copartners, should either desire, to invoke the equity powers of the court to adjust the partnership business and to stay proceedings under the execution, till the beneficial interest of the debtor partner in the goods seized has been ascertained. But that if the creditor does not so elect, and no such steps are taken by the other partners, the officer executing the writ must sell the apparent interest of the debtor in the chattels levied on, and upon such sale, redeliver the same to the other partners and the purchaser, who will then be owners in common, subject to a lien in favor of the other partners and the joint creditors, upon the interest of the debtor partner in the hands of the purchaser, for any balance due upon final adjustment of the partnership account.

It does not appear from the averments of the petition that the officer executing the process took the goods seized into his exclusive possession, and it is perhaps inferable from the petition that he suffered the same to remain in the custody of the other partners without receipt or security. His doing so, however, was not an abandonment of the levy: Gwynne on Sher-

iffs, 212; and as the petition avers that the other defendant, Atkison, who still holds the goods, and by purchase from Nash, claims the entire property therein, was aware of the levy at the time it was made, the defense of a *bona fide* purchaser could not be interposed.

The judgments of the district court and court of common pleas reversed, the demurrer to the petition overruled, and the cause remanded to the common pleas for further proceedings.

SUTLIFF, C. J., and GHOLSON, BRINKERHOFF, and SCOTT, JJ., concurred.

INTEREST OF PARTNER IN PARTNERSHIP GOODS MAY BE LEVIED ON TO SATISFY INDIVIDUAL DEBT: *Hubbard v. Curtis*, 74 Am. Dec. 283, note 291; *Conroy v. Woods*, 73 Id. 605. In *Myers v. Smith*, 29 Ohio St. 120, 126, it is held that an indebtedness due to a copartnership cannot be garnished in the hands of the debtor to pay the separate debt of one of the partners; but the court say in conclusion that tangible property of the firm stands on a different footing, and that there was no intention, by what was said in the opinion, to qualify in any degree the recognized right of the separate creditor to levy on the interest of one of the partners in such property, citing the principal case.

ONLY BENEFICIAL INTEREST OF PARTNER IN PARTNERSHIP PROPERTY is liable to satisfaction of his individual debt: *Hubbard v. Curtis*, 74 Am. Dec. 283, note 291; *Deal v. Bogue*, 57 Id. 702, note 707.

LEVY ON PARTNERSHIP PROPERTY FOR INDIVIDUAL DEBT OF ONE PARTNER: See *Hubbard v. Curtis*, 74 Am. Dec. 283, and cases cited in the note 291.

CASES
IN THE
SUPREME COURT
OF
OREGON.

GOODALL v. STATE.

[1 OREGON, 333.]

DYING DECLARATIONS ADMITTED IN EVIDENCE MAY BE DISCREDITED by showing that the deceased was a disbeliever in a future state of rewards and punishments.

EVIDENCE SOUGHT TO LAY FOUNDATION TO IMPEACH WITNESS MUST BE RELEVANT TO ISSUE.

ERRONEOUS INSTRUCTION TO JURY, NAMELY, that "to justify a killing in self-defense, it was necessary that an assault should have been committed by the person killed; that it was not enough that the party killed had a pistol in his hand, but that there must have been a presentation of it, or some demonstration of shooting;" and that "the having a drawn pistol in his hand, by deceased, would not be enough, although deceased had threatened to take the life of the prisoner, and those threats had been communicated to him."

JURY MAY BE PROPERLY INSTRUCTED that if they "believed from the evidence in the case that there was reasonable ground for A to believe his life in danger, or that he was in danger of great bodily harm from the deceased, and that such danger was imminent, and he did so believe, and acting on such belief killed the deceased, he was excusable; and that it was not necessary that he should wait till an assault was actually committed."

REASONABLENESS OF APPEARANCES UNDER WHICH PARTY CLAIMS TO JUSTIFY TAKING LIFE may properly be left to a jury, under the instructions of the court.

NECESSITY OF PROVING JUSTIFICATION UPON CHARGE OF MURDER, the killing being admitted, does not devolve upon the prisoner under Oregon statute.

UNDER OREGON STATUTE, IN ALL TRIALS FOR MURDER, PROSECUTION MUST GO INTO PROOF OF FACTS AND CIRCUMSTANCES OF KILLING, in order to establish malice.

DYING DECLARATIONS, OR THOSE WHICH ARE PART OF RES GESTÆ, are the only declarations of the deceased which are competent evidence.

GOODALL was indicted and convicted for the murder of one Potts; and the case stands in this court on errors assigned on bill of exceptions. It appeared that Potts went to the house of one Aldrich, where Goodall resided, in Goodall's absence. When Goodall returned, he first saw Potts at the door of the house, and at the door of Goodall's private room. Goodall was at a short distance from the house. Potts was shot with a pistol in two places. He had a pistol which was not discharged, and as to whether it was drawn or not, the evidence conflicts. There was evidence tending to show that Potts had threatened violence to Goodall, and that Goodall was informed of these threats. The deceased's dying declarations were admitted in evidence. Other facts appear in the opinion.

Williams and Kelly, for Goodall.

W. W. Page, for the state.

By Court, BOISE, J. The dying declaration of the deceased being admitted in evidence, the counsel for the prisoner offered to prove that the deceased was a disbeliever in a future state of rewards and punishments, for the purpose of discrediting his dying declarations. And I am of opinion that such evidence should have been admitted; for this belief, and the anticipation of future retribution, is the only sanction of such declarations. It is supposed that one impressed with the fear of immediately impending dissolution, and believing that he will soon be called to answer for the truth of his statements to his final judge, will be under restraint against falsehood sufficient to make the admission of such evidence safe, and generally contribute to the ends of justice. But when the deceased was a disbeliever, and consequently under no apprehension of future punishment for his falsehood, it is reasonable to believe that, however much he may be impressed with the fear of immediate and certain death, still he would not be under such strong influences to make a true statement of the facts as one impressed with the belief of future accountability: 1 Greenl. Ev., sec. 157; 2 Russell on Crimes, 764, 766.

The next ground of error is, that the court refused to allow N. Bell, a witness for the prosecution, to answer this question, to wit: "Did you state to Robbins and Hamilton that if Goodall met Potts, he (Goodall) would be the worst whipped man he ever saw?" This question was asked to lay a foundation to impeach the witness; and as I think the evidence sought

by this question was irrelevant to the issue, I am of opinion it was properly excluded.

The next question in this case arises on the several instructions of the judge as to what would justify the taking of life in self-defense; and all there is on the subject in the instructions may be considered together. After instructing the jury in the language of the statute, the court said: "To justify a killing in self-defense, it was necessary that an assault should have been committed by the person killed; that it was not enough that the party killed had a pistol in his hand, but that there must have been a presentation of it, or some demonstration of shooting." The court also said that "the having a drawn pistol in his hand by deceased would not be enough, although deceased had threatened to take the life of the prisoner, and these threats had been communicated to him."

I understand, by these instructions, that the court held the law to be, that an actual assault with the pistol was necessary to justify the killing, which means, that there must have been, on the part of the deceased, an attempt to shoot the prisoner; and until such attempt was made, the prisoner would not have been justified in acting on the defensive, and in shooting the deceased, although deceased appeared before him with a drawn pistol and had threatened his life. If such be the law, then there is no such thing as available self-defense, when the assailant makes his attack with a pistol or other kind of fire-arm; for the assault and discharge of the weapon are simultaneous, or so nearly so, that resistance would be almost impossible. Suppose A, who has threatened the life of B, appears to B suddenly, at the house of the latter, at an unusual place, armed with a gun, and in a threatening attitude, and B, induced by the previous threats and unusual appearance of his adversary, and believing his own life in imminent danger, and having himself a pistol, shoots A and kills him before A actually makes an attempt to level his gun, would this be murder? I think not. Such a case, unchanged by other evidence than the killing, would lack all indications of malicious intent, which is necessary to constitute murder.

If B, under such circumstances, acting from appearances, and believing that he was in actual and imminent danger of death or great bodily harm, should kill A, I think he would be justified. By the common law, one acting from appearances in such a case, and believing the apparent danger imminent, would be justified, though it afterwards turned out that

there was no real danger, and that the gun of the assailant was only loaded with powder. This is certainly as strong a case for justification as when one, alarmed in the night by the cry of thieves, rushes forth in the dark and by mistake kills an innocent person, and in such a case the slayer would be excused at common law. Such was the *dictum* in the *Levett Case*, which has been approved by the English commentators: 1 East P. C. 274; 1 Russell on Crimes, 669.

In the case before us there was evidence tending to show that when the prisoner first saw deceased at the time the fatal shots were discharged, deceased had a pistol in his hand, and was standing on the door-step of the prisoner's private room; which was an unusual place for one who had threatened the prisoner's life, and whom he considered his enemy. And I think the court should have instructed the jury that if they believed, from the evidence in the case, that there was reasonable ground for Goodall to believe his life in danger, or that he was in danger of great bodily harm, from the deceased, and that such danger was imminent, and he did so believe, and acting on such belief killed the deceased, he was excusable; and that it was not necessary that he should wait until an assault was actually committed.

The whole doctrine of self-defense was ably examined and illustrated in the case of Thomas O. Selfridge [not reported], tried in the supreme court of Massachusetts; and that the doctrines of that case were adopted, in the state of New York, in the case of *Shorter v. People*, 2 N. Y. 193 [51 Am. Dec. 286], where it is declared by Bronson, judge, in speaking of the same case, "that when, from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended." "To this doctrine," says the learned judge, "I fully subscribe; a different rule would lay too heavy a burden on poor humanity." He further says that the authority of the Selfridge case was followed by the revisers in framing the statutes of New York touching this question. And our statute is a copy of the New York statute, and if the doctrine is properly applicable there, then it is applicable here also.

As to what will constitute reasonable grounds of belief in such cases, sufficient to justify taking life, must depend, to a considerable extent, on the circumstances of each particular

case. And the reasonableness of the appearances under which a party claims to justify may very properly be left to a jury, under the instructions of the court. And I think it is going too far to lay down the general rule that an actual assault must be committed; for such a rule would take away, or at least render almost unavailable, the right of self-defense, when fire-arms are used. It is also assigned as error that the court instructed the jury, "that killing being admitted by the accused, it devolved on him to prove that he was justifiable." I think this instruction in conformity with the common law; but it is not necessary to examine the common-law authorities on this subject, for our statute, in the fourth section of the third chapter, provides, "there shall be some other evidence of malice than the mere proof of killing, to constitute murder in the first or second degree." This, I think, is conclusive on this subject; for it was the evident intention of the legislature, by this statute, to impose on the prosecution some further burden than the mere proof of the killing to establish the malice, which, under our statute, is not to be presumed from the mere proof the killing, and I think the instruction of the court was error.

There is another ground of error assigned, which is, that the court erred in permitting the declarations of Potts to be given in evidence, made to his son prior to the killing, and declaring the reason why he was going to the house of Aldrich, where he was killed. I think this evidence was improperly admitted; and that the only declarations of the deceased which are competent are dying declarations, or those which are part of the *res gestæ*.

Judgment is reversed.

DYING DECLARATIONS, ADMISSIBILITY OF: *McDaniel v. State*, 47 Am. Dec. 93; *Anthony v. State*, 33 Id. 143; *Dunn v. State*, 35 Id. 54; *Moore v. State*, 46 Id. 276; *Commonwealth v. Casey*, 59 Id. 150. Instructions in reference to: *State v. Johnson*, 74 Id. 321.

WANT OF RELIGIOUS BELIEF IN WITNESS, HOW SHOWN: *Commonwealth v. Smith*, 61 Am. Dec. 478.

IMPEACHING WITNESS: See *Merriam v. Hartford etc. R. R. Co.*, 52 Am. Dec. 344, 349, note; *Crane v. Thayer*, 46 Id. 142; *Commonwealth v. Mead*, 71 Id. 741; *Gilliam v. State*, 73 Id. 161; *Allen v. Harrison*, Id. 302; *Allen v. State*, Id. 762, note.

HOMICIDE, WHEN JUSTIFIABLE ON GROUND OF SELF-DEFENSE: *Harrison v. State*, 60 Am. Dec. 450; *Shorter v. People*, 51 Id. 286; *State v. Chandler*, 52 Id. 599; *Scribner v. Beach*, 47 Id. 265; *Campbell v. People*, 61 Id. 49; *Noles v. State*, 62 Id. 711; *Dukes v. State*, 71 Id. 370; *State v. Thompson*, 74 Id. 342; *Wesley v. State*, 75 Id. 62.

FAHIE v. PRESSEY.

[2 OREGON, 23.]

EQUITY AFFORDS NO RELIEF TO PARTY WHO HAS LOST HIS REMEDY AT LAW through mere ignorance of fact, the knowledge of which he might have obtained by due diligence, where there is neither mistake, accident, nor fraud.

IN PLEADING FRAUD, ACCIDENT, OR MISTAKE, the facts and circumstances must be alleged.

WIFE IS NOT ESTOPPED BY HER MERE SILENCE FROM AFTERWARDS ASSERTING HER RIGHTS, where land in fact belonging to her, but supposed to belong to her husband, is sold under decree of foreclosure, the wife not having been served in the suit; nor is she to be regarded as having ratified the proceedings by the acceptance of a part of the purchase-money of the sale, but in such case must be taken to have acted as the agent of and subject to the control of her husband.

WIFE IS NECESSARY PARTY TO FORECLOSURE SUIT, and must be duly served with process in such suit, she being the legal owner of the mortgaged property.

BILL in chancery. Respondents, husband and wife, mortgaged a parcel of land to secure the payment of a sum of money, for which a note was also executed by the husband and one Lathrop. On default, the mortgagee was empowered to sell the premises in manner prescribed by law, pay the debt, and pay the surplus, if any, to respondents. Default was made, suit to foreclose was begun, and respondents and Lathrop were made defendants, but service was had upon the husband only. Decree of foreclosure was entered against the husband, and an order for the sale of the premises made; and the cause continued as to the other defendants. Complainant bought the premises at public auction, and after payment of the debt, interest, and costs, a balance was paid over to and received by the wife. It was averred that at the time of the sale all parties looked upon the proceedings as foreclosing the rights and interests of both respondents. After the sale, complainant discovered that the title was in the name of the wife, but avers upon information and belief that the land is in fact the property of the husband, purchased and improved with his money, and that the right of his wife is merely nominal; that she had full knowledge of all the proceedings, and that the property was advertised as that of her husband; that she suffered it to be sold as such, and with full knowledge that the property had been so sold, received a part of the proceeds of the sale, and ratified the same; but afterward she set up a claim to the property, and refused to recognize the right of the

complainant thereto, thereby rendering the property of little value in his hands. To foreclose this alleged nominal interest, the bill was brought. Respondents demurred, demurrer was sustained, and complainant appealed.

George H. Williams, for the appellant.

Smith and Page, for the appellees.

By Court, STRATTON, J. As the case stands on demurrer to the bill, it must be determined by such interpretations as by law ought to be given to the allegations of complainant; and upon these allegations, not controverted, is he entitled to relief upon his own showing? It may be remarked in passing, as a well-settled rule of pleading, that every question of accident, surprise, mistake, or fraud must rest, not upon the mere statement of the pleader, *eo nomine*, but upon such a showing of facts and circumstances, if taken as true, as must lead to that legal conclusion: Story's Eq. Pl. 251. Upon similar principle and for like reasons, the legal relations of persons and property are not to be affected by mere allegations, unsupported by facts, such as would justify a court in pronouncing judgment for the allegor upon such a showing of acts on the record.

These rules follow in a great measure from the character of the demurrer as well as from the necessity and justice of putting the respondents upon notice of the particular case which he has to meet. Tested by these rules, no question of mistake or fraud could legally arise upon the complaint before us. We will consider each question more in detail. While it is the peculiar province of a court of equity to inquire into and relieve against the consequences of mistake of facts into which a complainant may have fallen, to his damage, it by no means follows that every mistake of facts which has worked an injury is relievable against. A large proportion of the misfortunes of life are not so much attributable to the superior sagacity or overreaching unscrupulousness of one class as to the blind folly and negligence of another. Litigation would never end were courts to undertake to restore the equilibrium of right between all such parties. To entitle a party to relief in such cases, the facts must not only be material, but must be such that he could not with reasonable diligence have obtained knowledge of them. Where there is neither accident nor mistake, fraud nor misrepresentation, equity affords no relief to a party on the ground that he has lost his remedy at law through

mere ignorance of a fact, the knowledge of which might have been obtained by due diligence and inquiry: Willard's Eq. Jur. 70. How, then, it must be asked, has the complainant shown himself entitled to relief?

After the sale, so the bill states, he discovered that the title was in the name of Penna Pressey. How or when this discovery was made is not stated, and in the absence of such information, we must presume that the deed was found on record where the law requires it to be placed; and we must further presume that it was recorded in due time, and was notice to the complainant, and all the world. The information was as accessible before as after the sale. *Vigilantibus non dormientibus jura subveniunt.*

It is sought to charge Penna Pressey with fraud, actual or constructive. Two principal facts in the bill are relied on to support the charge: 1. That Penna Pressey had knowledge of the proceedings in the premises, the advertisement and sale of the property as the property of her husband, and that by her silence she is estopped from saying to the contrary; and 2. That after the sale, the surplus, some six hundred dollars, was paid to and received by her, and that by so receiving the money she ratified the proceedings. The first proposition must proceed upon a fact which appears on the face of the bill, that Penna Pressey was never served with process for the purpose of bringing her before the court; but that her knowledge and her silence must operate precisely in the same manner as if her husband and a third party had been dealing with her separate property instead of a court.

The fallacy of this proposition must be apparent at a glance, but of that we shall presently say more. If true, however, would she be estopped from asserting her title? It is as true in law as consonant with reason, that he who remains silent when he should have spoken, and permits his property to be dealt with by a stranger as his own, is estopped from asserting that right to the damage of another, when the latter, from his silence, might fairly infer that he had no interest in the thing. It is further true, that when a party, under a misapprehension of his legal rights, by his word or act places another party in an attitude of hostility to those rights, he must submit to the loss. This was the case of *Storrs v. Baker*, 6 Johns. Ch. 166 [10 Am. Dec. 316], cited by counsel of appellant as in his favor. In the view we have taken of this case, the authority is not in point. We are asked to deal with Penna Pressey as

if she were a third person, and not affected by the marital relation. Is there no presumption operating in favor of her silence as to her husband's dealings, when the very relation of wife is said to merge her legal existence in that of the husband, and to excuse her from punishment for the gravest of crimes because of that subjection under which the law places her in the nuptial compact? If that is not to be regarded as any excuse, is that confidence which should subsist between husband and wife, the harmony of the household which it has always been the policy of the law to maintain and encourage, not to be regarded? Or is this court to say that a wife, instead of remaining silent, should advertise her husband's act at every street corner? If he were dealing with her separate property, and by so doing perpetrating a fraud upon others, we have the highest authority for saying that she was not bound to speak, though she knew the fact: *Crenshaw v. Anthony*, Mart. & Y. 110; *Bank of United States v. Lee*, 13 Pet. 107.

The Tennessee case was much stronger than the present, for there the trust deed in favor of the wife of personal property, on the faith of which *Crenshaw* was given credit, was recorded in Virginia, and certainly not as accessible as in the case where the record was in the county—nay, in the same town—where the proceedings were had. In the case of *Bank of United States v. Lee*, 13 Pet. 107, Justice Catron, who delivered the opinion, said that "R. B. Lee did deal with and use the property in controversy, as if it had been his own, while he resided in this city (Washington), and that the community did believe him the true owner, and gave him credit on the faith of the property, is no doubt true; and it is very probable that Mrs. Lee knew the fact, but continued passive and silent on the subject." In both of these cases, the obligation of the wife to disclose her interest in the property being dealt with by the husband as his own, came directly under review, and in both her silence was approved on the express ground of her marital relation; and that she had done no affirmative act to mislead or draw in a creditor to trust her husband. But it is said that Penna Pressey, having notice of all these proceedings, by receiving a part of the proceeds of the sale, ratified it, and it would be a fraud on her part now to gainsay it. It might be answered to this—if it were in connection with other than a legal proceeding—that she must be presumed to have acted

as the agent of and subject to the control of her husband. We are of the opinion that she, having no legal notice, had no notice at all, and as to any interest, nominal or real, of hers, the proceedings of the court and the sale under the decree were a nullity. There is no attempt to show that, at the time the deed was made to the wife, the husband was in debt; and the deed in fraud of creditors; and if he were not, he might well procure a conveyance to her for her separate use, and the law will uphold it until fraud is shown.

The most important and decisive question remains to be considered. The bill expressly states that, after the sale, the title to the premises sold was found to be in the name of Penna Pressey, who was made a party to the original suit. Was she rightfully joined? If so, then service upon her was a necessity to confer any power on the court to deal with her interest in the controversy. If she were not a necessary party to the suit, and had no interest to bind, although more a party to the bill, the service might be omitted. But it is stated that the legal title was in the wife; nor does it change the result to say that her interest is merely nominal. She being the legal owner of the estate, which by law she might be, the legal title could be divested out of her only in two ways: by her own act, and by act of law; that is, the proceeding of a court having competent jurisdiction of the subject of the suit. She, being the legal owner of the property, before any proceeding could affect her interests, nominal or real, must have been made a party to the bill, have been duly served with process, and thus given the opportunity, by legal forms, of showing her rights, whatever they were. Not having been served in the foreclosure suit, the proceedings as to her were a nullity.

Judgment is affirmed.

EQUITY WILL NOT INTERFERE WHERE FULL AND ADEQUATE REMEDY EXISTS AT LAW: *Doggett v. Hart*, 58 Am. Dec. 464; *Redmond v. Dickerson*, 69 Id. 418; *Andrews v. Sullivan*, 43 Id. 53; *Lexington Life etc. Ins. Co. v. Page*, 66 Id. 165; nor grant relief upon ground of mistake arising from ignorance of law: *Pierson v. Armstrong*, 63 Id. 440; nor relieve a party against the consequences of his own laches: *Drinkard v. Ingram*, 73 Id. 250; *Stewart v. Stokes*, Id. 429; nor grant relief on ground of ignorance of facts which party could have ascertained by exercise of due diligence: *McDaniels v. Bank of Rutland*, 70 Id. 406; and see *Robertson v. Smith*, 60 Id. 234.

FACTS CONSTITUTING FRAUD MUST BE SET OUT SPECIFICALLY IN PLEADING: *Hynson v. Dunn*, 41 Am. Dec. 100; *Keller v. Johnson*, 71 Id. 306, *Clapp v. County of Cedar*, 68 Id. 678.

ESTOPPEL BY SILENCE: See *Godeffroy v. Caldwell*, 58 Am. Dec. 360; *Blanchard v. Allain*, 52 Id. 594; *Watkins v. Peck*, 40 Id. 156; *Danley v. Rector*, 50 Id. 242; *Titus v. Moore*, 63 Id. 665; *Bryan v. Ramirez*, 68 Id. 340.

ESTOPPEL OF MARRIED WOMEN: See *Nash v. Spofford*, 43 Am. Dec. 425; *Lessee of Hill v. West*, 31 Id. 442; *Bradley v. Snyder*, 58 Id. 564; *Morrison v. Wilson*, 73 Id. 593.

WIFE AS PARTY TO FORECLOSURE SUIT: See *Enslava v. Lepetre*, 56 Am. Dec. 266.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

BELDEN v. MUNGER.

[5 MINNESOTA, 211.]

CONTRACT, CONSIDERATION OF WHICH IS THAT WIFE WILL NOT APPEAR in a suit for divorce nor claim alimony, is void, though made by the husband with a third person, and providing a certain sum for the maintenance of the wife.

THE opinion states the facts.

Curtis, for the appellant.

Sanford and Beveridge, for the respondent.

By Court, EMMETT, C. J. The right of plaintiff to recover in this action depends upon the following facts, which appear from the record: It seems that one Lucius M. Belden had commenced proceedings in the district court to procure a divorce from his wife, Roxa Belden. That during the pendency of said action, he entered into an arrangement with her, through the parties to the present action, by which he agreed, in consideration that she would not appear in said action for divorce and set up a claim to alimony, that he would transfer to Henry Belden, the defendant herein, four promissory notes, which he then held against one Charles A. Belden, and which were secured by a mortgage on certain real estate, in trust to be held by said Henry, until said action for divorce should be determined; and if said Roxa did not appear in said action and claim alimony, then to deliver them to Munger, the plaintiff herein, to be by him held and collected for the use and benefit of said Roxa. That pursuant to said arrangement, the

notes were deposited with the defendant, and the said Roxa thereupon neglected to appear in said action, and did not set up any claim for alimony, and said divorce was accordingly granted by the court, without any provision for her maintenance; and that after the divorce was thus obtained, the defendant refused, on demand, to deliver the notes to the plaintiff. The plaintiff thereupon commenced the present action, alleging, in detail, the foregoing facts, and that the mortgage was ample security for the notes; and claiming judgment for the amount of said notes. The answer put in issue all of the facts stated in the complaint, except that concerning the pendency of the action for divorce, and alleged further that the notes were placed in his hands by said Lucius for the use, and to be disposed of according to the directions, of Charles A. Belden; and that before the commencement of this action, he had returned them to said Lucius, by direction of said Charles. There was no reply, and on the trial the jury returned a general verdict in favor of the plaintiff for the amount of the notes.

Quite a number of questions as to the rulings and charge of the court, the sufficiency of the evidence to justify the verdict, etc., were raised during the trial, and on the motion for a new trial, but we think it is only necessary to decide upon the validity of the contract, which lies at the foundation of the action.

Whatever of doubt may have existed as to the end to be accomplished by the agreement set forth in the complaint, is dissipated by the construction put upon it by the parties in their subsequent conduct. It was insisted that the agreement on the part of the wife did not extend beyond what she should receive in lieu of alimony, in the event that the court should decree a separation; and yet we find that she was very careful not to appear in the action and resist the divorce. This we are satisfied would not have been the case had not the agreement involved as well her non-appearance in the action, as that she should make no claim to alimony. The language of the contract is in the conjunctive: "That the said Roxa would not appear in said action and interpose her claim for alimony," etc. She evidently understood it as including both, and acted accordingly. Certain it is to our mind, that this contract was the sole inducement for her default in resisting the action. Its sole object was to facilitate the husband in obtaining the divorce sought by the action then pending, by a compromise as to the alimony. In effect, the parties dissolved

the marriage tie existing between them by agreement. The husband agreed to give a certain sum in lieu of the maintenance to which the wife was entitled out of his property, and in consideration therefor she agreed not to appear in the action and to make no claim for alimony. There was a flimsy disguise of the real nature of the transaction, by the introduction of third persons as trustees, but not sufficient for the purpose intended. It is apparent that trustees were interposed in hope of avoiding the very difficulty we are now considering, and perhaps also to obviate the objection against a husband contracting directly with his wife. But the great objection here is not so much to the parties by whom the contract was made, as to the nature and object of the contract itself. Such an agreement would have been equally against public policy, though the husband and wife had not joined in it, so long as it was the intention of the parties to effect by means thereof the dissolution of a marriage contract.

We were advised on the argument that to refuse to enforce this contract would work great hardship in this particular case, because, as was asserted, the wife will be thrown, in the decline of life, upon an uncharitable world without support or maintenance, while the husband is in the enjoyment of ample means, which she assisted in accumulating, and is lavishing them on another whom he has since married. If such be the fact, we can but regret it, but it must be remembered that it has resulted from the ill-advised contract of the wife in aiding her husband to procure a divorce. Had the court known that the parties to that proceeding had entered into such an agreement as that sought to be enforced by this action, and that the defendant therein had received, or was to receive, a consideration for not appearing and defending, we are warranted in saying that a separation would never have been decreed. The concealment of this agreement, and the conduct of the parties to the proceedings for divorce, were a fraud upon the court and the administration of justice, and there is no principle that will warrant us in aiding a party to secure the fruits of a contract intended, as this was, to practice a fraud both upon the law and the court that administered it.

The order denying a new trial is reversed, and a new trial awarded.

AGREEMENT TO WITHDRAW OPPOSITION TO DIVORCE PROCEEDINGS cannot form a valid consideration for a promissory note, and the note is void: *Sayles v. Sayles*, 53 Am. Dec. 208, and note 212.

CONTRACT HAVING FOR ITS OBJECT DISSOLUTION of marriage relation is against public policy, illegal, and void: *Sayles v. Sayles*, 53 Am. Dec. 208, and note; *Adams v. Adams*, 25 Minn. 79, citing the principal case to both of the above points.

HUSBAND'S CONVEYANCE TO DEFEAT WIFE'S ALIMONY, made after the cause of divorce has accrued and before a bill is filed, is void as to the wife: *Livermore v. Boutelle*, 71 Am. Dec. 708, and note 710.

STATE v. BACHELDER.

[5 MINNESOTA, 223.]

UNITED STATES HAS BUT PROPRIETARY INTEREST in land within the borders of the state, the sovereignty being in the state, and the rights attaching to such interest do not differ from those of any other land-holder in the state, except, as provided by the constitution of the United States, and the terms of the compact between the general and state governments at the time the state is admitted into the Union. The state therefore cannot interfere with the primary disposal of the soil, nor with any regulations congress may find necessary for securing title to *bona fide* purchasers, nor can it tax the lands of the United States within its borders, and with these exceptions, such lands are subject to the same control by the state government as any other lands over which its jurisdiction extends.

WHILE LANDS BELONG TO UNITED STATES they may be disposed of by that government to whom it pleases, and the title may be secured to the purchaser in such manner as it sees fit to prescribe, but the moment the sale is completed and the title secured to the purchaser, the land enters into the general mass of the property of the state, relieved from all control of the federal government whatever, save such as is incident to the general relation of the state to the federal Union.

STATE TRIBUNALS HAVE JURISDICTION to try and determine conflicting claims to lands within its borders, when they arise between citizens of the state, or the state and a citizen, to the same extent that any other question of title or property may be entertained by its courts. And it can make no difference in this respect that both claimants are grantees of the United States.

ONLY LIMITATIONS UPON STATE IN REGARD TO QUESTIONS cognizable in its courts are such as it may have itself created by the adoption of the federal constitution; these extend to all cases at law and in equity arising under that instrument, and the laws and treaties of the United States, but it does not follow that the state has relinquished jurisdiction over questions involving private rights, simply because these rights have their origin in some law of the United States.

FEDERAL JUDICIARY CAN EXERCISE NO CONTROL WHATEVER over decisions of state courts, simply because some law, treaty, or authority of the United States is called into question in the state court; but only when the decision of the state court is against the validity of the right, title, or claim set up under such law, treaty, or authority.

FEDERAL JUDICIARY HAS NO CONTROL OVER QUESTIONS, when once the state courts have acquired jurisdiction, until the state has finally ex-

hausted its judicial power over them by a final decision in its highest tribunal.

IT IS PECULIARLY QUESTION FOR SUPREME COURT to determine whether it has jurisdiction to review a decision made in a state court. It is sufficient for the latter to feel assured that it has jurisdiction over the question it is called upon to decide.

FRAUD OR OTHER IRREGULARITY MUST APPEAR ON FACE of letters patent for land, to render them void in a court of law. When the fraud or other defect arises on circumstances *dehors* the patent, it is voidable only in a suit in equity.

ACTION TO SET ASIDE PATENT TO LAND on the ground of fraud, by a party in actual possession, and brought under the Minnesota statute for determining an adverse claim, estate, or interest in land, is as much a direct proceeding to set aside the patent, as would be a bill in equity filed for that purpose.

STATE LAND-OFFICERS ACT JUDICIALLY, and their decisions are as final as those of other courts, in all matters which by law are confided to their examination and decision.

PATENT, ISSUING IN VIRTUE OF DECISION OF LAND-OFFICERS, may be impeached in equity for fraud or collusion in obtaining it, even where such officers act clearly within the sphere of their jurisdiction. But even in equity, it must be made to appear that the party had no remedy at law adequate to his protection. Nor will the court set aside the decision upon the suggestion of fraud alone.

IN ACTION TO SET ASIDE LAND PATENT obtained through fraud, if it appear that plaintiff had notice and contested, or had an opportunity to contest and did not take advantage of it, the admission of false testimony would not be sufficient ground for relief.

THE opinion sufficiently states the facts.

Cole, attorney-general, for the state.

Bachelor and Buckham, for the respondent.

By Court, FLANDRAU, J. This court has on a former occasion examined the position occupied by the United States, and its rights as a land-holder within the borders of this state. In the case of *Camp v. Smith*, 2 Minn. 155-175, that question was fully discussed, and our views there expressed are substantially that the United States has but a proprietary interest in such land, the sovereignty being in the state. That the rights attaching to such interest do not differ from those of any other land-holder in the state except as provided by the constitution of the United States, and the terms of the compact between the general and state governments at the time the state is admitted into the Union. These exceptions are as follows:

The constitution of the United States, by article 4, section 3, provides that "the congress shall have power to dispose of

and make all needful rules and regulations respecting the territory or other property belonging to the United States."

The act of congress authorizing the people of the territory of Minnesota to form a constitution and state government preparatory to their admission into the Union, etc., passed February 26, 1857, contained certain propositions to the people of Minnesota, subject to their acceptance or rejection. On the part of the United States, the government offer to grant to the state certain lands for school, university, and public building purposes, also salt springs and adjacent lands, and five per cent of the net proceeds of the sales of the public lands lying within the state, upon the condition that the state will, by a clause in its constitution irrevocable without the consent of the United States, provide that the state shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations congress may find necessary for securing the title in said soil to *bona fide* purchasers thereof; and that no tax shall be imposed on lands belonging to the United States, and that non-resident proprietors shall not be taxed higher than residents: Sec. 5; see Comp. Stats., p. 43.

These several propositions were distinctly accepted by the state upon the terms required by the act, by a clause in the state constitution: Const., art. 2, sec. 3.

The state, therefore, cannot interfere with the primary disposal of the soil, nor with any regulations congress may find necessary for securing title to *bona fide* purchasers, nor can it tax the lands of the United States within its borders; and with these exceptions, such lands are subject to the same control by the state government as any other lands over which its jurisdiction extends.

It will be seen that all these rights reserved by congress are in terms restricted in their operation to the period during which the lands are the property of the United States. While the lands belong to the United States, they may be disposed of by that government to whom it pleases, and the title may be secured to the purchaser in such manner as it sees fit to prescribe; but the moment the sale is completed, and the title secured to the purchaser, the land enters into the general mass of the property of the state, relieved from all control of the federal government whatever, save such as is incident to the general relation of the state to the federal Union.

These observations are made with a view to one point raised

by the counsel for the defendant, that the source of the defendant's title being a patent from the United States, it was not subject to impeachment in any tribunal save those of the federal government. If the above position is correct, that the land, on passing from the United States by grant, and becoming the property of the citizen, loses all its privileged features, and stands as any other property within the state, then it follows that the state must have jurisdiction to try and determine conflicting claims to the same, when they arise between citizens of the state, or the state and a citizen, as in this case, to the same extent that any other question of title or property may be entertained by its courts. And it can make no difference in this respect that both claimants are grantees of the United States. The question is simply one of title to land between parties, and concerning a subject-matter clearly within the jurisdiction of the state tribunals. The question in this case involves, it is true, the construction of an act of congress as the source of title on the part of the state, and an examination of the validity of a patent granted by the United States of the same lands to the defendant, alleged to have been obtained by fraud; but the doctrine is both a novel and alarming one, that the state tribunals have not the power, at least in the first instance, to entertain questions arising under acts of the federal government and its officers when involving the rights of its citizens.

The only limitations upon the state in regard to the questions cognizable in their courts, are such as they have themselves created by the adoption of the constitution of the United States, and though they have consented that the federal jurisdiction shall extend to all cases in law and equity arising under that instrument, and the laws and treaties of the United States, it does not follow that they have relinquished jurisdiction over questions involving private rights simply because those rights had their origin in some law of the United States. It is a matter of very frequent occurrence that the state courts are called upon to construe the laws and treaties of the United States, and acts of authority emanating from that government, in matters properly appertaining to their jurisdiction; and the federal judiciary can exercise no control whatever over their decisions on such questions simply because such law, treaty, or authority was called in question in the state court; but only when the decision of the state court is against the validity of the right, title, or claim set up under

the law, treaty, or authority of the United States: Judiciary Act of September 24, 1789, sec. 25; 1 U. S. Stats. at Large, p. 85, 86; *Williams v. Norris*, 12 Wheat. 117. Nor has the federal judiciary any control over such questions when once the state courts have acquired the same, until the state has finally exhausted its judicial power over them by a final decision in its highest tribunal: *Houston v. Moore*, 3 Id. 433.

Whether or not the supreme court of the United States would have jurisdiction to review the decision we may make in this case is peculiarly for that court to determine. It is always quite sufficient for us to be well assured that we possess jurisdiction over the questions that we are called upon to decide, and leave every other court of superior appellate powers to do the same. The observations above made, with regard to the jurisdiction of the supreme court of the United States, and the decisions of that court cited, are more to show the views entertained by it of our jurisdiction than to comment upon the extent of it.

Having ascertained that the question of title involved in this case may be tried in our own courts, we come to the next question raised by the defendant, which refers to the proper form of action in which to assail a patent. It is contended that it only can be impeached in an action commenced in equity to set it aside.

This doctrine is substantially decided in the supreme court of the United States, in the case of *Polk v. Wendal*, 9 Cranch, 87. That was an action of ejectment, and the court, at page 99, after declaring that a court of equity is the most eligible tribunal to examine such questions, for the reason that in such courts "the specific points must be brought into view, the various circumstances connected with those points considered, and all the testimony respecting them may be laid before the court," say by way of qualification to the above rule, that "there are cases in which the grant is absolutely void; as where the state has no title to the thing granted, or where the officer had no authority to issue the grant. In such cases, the validity of the grant is necessarily examinable at law."

The same is held in the case of *Patterson v. Winn*, 11 Wheat. 380; and also in *Boardman v. Reed & Ford*, 6 Pet. 328; see also *People v. Livingston*, 8 Barb. 253; *Jackson v. Marsh*, 6 Cow. 281; *Jackson v. Lawton*, 10 Johns. 23 [6 Am. Dec. 311]. In which latter case Chief Justice Kent, after examining the law pretty thoroughly, uses the following language: "Unless letters

patent are absolutely void on the face of them, or the issuing of them was without authority, or was prohibited by statute, they can only be avoided by a regular course of pleading, in which the fraud, irregularity, or mistake is directly put in issue. The principle has been frequently admitted that the fraud must appear on the face of the patent to render it void in a court of law; and that when the fraud or other defect arises on circumstances *dehors* the grant, the grant is voidable only by suit:" *People v. Mouran*, 5 Denio, 389; *Jackson v. Hart*, 12 Johns. 77 [7 Am. Dec. 280].

This principle is certainly well founded in reason, and the cases above cited are of undoubted authority. The reason given for the principle is this: that patents are high record authority; that they import verity, and should not be impeached in any court that does not enjoy a full opportunity to investigate the whole subject upon a regular course of pleading and proof directed expressly to the points of irregularity or fraud complained of.

The form of action adopted by the plaintiff to test the question at bar is under the following provision of statute:

"An action may be brought by any person in possession, by himself or his tenant of real property, against any person who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse claim, estate, or interest:" Comp. Stats., p. 595, sec. 1.

The language of this statute is not confined to the determination of any particular character of claim, estate, or interest that may be asserted adversely to a party in possession of land, but comprehends all claims of what nature soever, and authorizes the determination of them in the action so brought under it.

We had occasion to rule upon this statute in the case of *Steele v. Fish*, 2 Minn. 153, where we held that it was the intent of the legislature in passing that act, that any one who has the actual possession of land, and consequently is *prima facie* the owner of the same, may upon that fact alone institute an action against any one who casts a cloud upon his title, and compels him to spread his claim upon the record, that it may be adjudicated and forever put at rest." This is undoubtedly the object of the statute, and we think it affords a ready means of trying such questions, giving as it does all the advantages of a "regular course of pleading" similar in all respects to that of a bill and answer in chancery. The

complaint shows a *prima facie* right in the plaintiff, and an adverse claim in the defendant. The answer exhibits the nature of the defendant's claim. The reply sets forth all the facts that the plaintiff relies upon to defeat the claim of the defendant, and the facts of the reply are all put in issue by the operation of the statute: Comp. Stats, p. 543, sec. 88. None of the reasons, therefore, out of which have grown the rule that a patent cannot be assailed collaterally, or in an action of ejectment, apply to an action prosecuted under this statute. It is as much a direct proceeding to set aside the patent as would be a bill filed for that purpose. The pleadings contain the same facts, and they are adjudicated in the same tribunal. The plaintiff has selected a form of action fully adequate to test the question he seeks to raise.

The settlement of these preliminary questions leads us to the merits of the controversy. The plaintiff claims title to the land in question under the act of congress, February 26, 1857, Comp. Stats., p. 12, which by section 5 grants to the state for the use of schools sections numbered 16 and 36 in every township, except such parts thereof as had been previously sold. This grant became absolute upon its acceptance by the convention and the subsequent adoption of the state constitution by the people on the thirteenth day of October, 1857; and did the question rest upon the statute alone, it would have passed to the state all the lands embraced in such sections 16 and 36 that the United States was the owner of on the twenty-sixth day of February, 1857, the day of the passage of the act: *Grignon v. Astor*, 2 How. 319; *United States v. Brooks*, 10 Id. 442.

The act, however, was qualified by a joint resolution of congress passed March 3, 1857, which authorized parties who had settled upon school lands previous to their having been surveyed, to pre-empt the same, on bringing themselves within the requirements of the pre-emption act in all other respects. The state, therefore, took the grant of these school sections incumbered by the claims of such parties as had made settlement upon them prior to the survey and could bring themselves within the resolution and the pre-emption act.

The defendant claims that his assignor made his settlement before the surveys, pre-empted the land, and received his patent therefor from the government of the United States. The plaintiff in his reply, alleges that the pre-emption was made by

fraud, that the assignor of the defendant did not in fact make any settlement upon the land before the survey, and that he procured a witness to swear falsely to the necessary facts before the land-officers, to obtain from them a certificate of pre-emption, etc. The pleadings are full in their allegations, the above is merely a compendium of their contents. The reply is demurred to for insufficiency, and the defendant had judgment on the demurrer in the court below.

In all the various aspects in which the case is presented by the plaintiff, I can see but one real question which lies at the root of them all, and that is, whether the decision of the land-officers upon the facts of settlement prior to the surveys is so absolutely conclusive as to cut off any subsequent inquiry concerning the same. The defendant insists that upon the finding of such fact by the land-officer, the question of settlement becomes *res judicata* as fully and finally as if a jury had so found in a former suit between these parties where that question had been necessarily involved.

The plaintiff urges four grounds upon which he may question the patent of the defendant: 1. When the officers act without the pale of their authority; 2. When the patent is obtained by the fraud and perjury of the patentee; 3. When the action is brought by a grantee seeking to establish his priority of title, and thereby to show that the common grantor had no title to convey to the defendant; 4. When the object of the evidence is to define and fix the limits of the grant, and thereby show that it covers land claimed by the adverse party.

I cannot see that the nature of the question is at all changed by the different forms in which the plaintiff puts it. The officers cannot be said to have acted without the pale of their authority in hearing the case of the pre-emptor, and if they were imposed upon by fraudulent suggestions and perjured evidence, then it is a question of fraud, and not of excess of authority, or want of jurisdiction. If the plaintiff desires to show that the United States had parted with its title by the act of February 26, 1857, and thus claim a prior title to that of the patentee, it can only do so by showing that the latter had not in fact made the settlement prior to the survey; because upon that fact depends the priority of the plaintiff's title, and this at once brings up the question of the conclusiveness of the decision of the land-officers; and the same reasoning applies to the fourth ground of the plaintiff. The limit of the grant to the plaintiff can only be fixed and defined, so as

to exclude the patentee, by showing his settlement not to have been made prior to the survey. So the whole question necessarily resolves itself into the fraud of the patentee in proving this fact before the land-officers, and whether that can be shown to impeach the patent; and in this light we will examine it.

This court has had the question of the powers of the United States land-officers, and the effect of their decisions, under consideration, to some extent, in the case of *Leech v. Rauch*, 3 Minn. 448. It was our opinion, then, that in all matters which by law are confided to their examination and decision, they act judicially, and their decisions are as final as those of other courts: See *McConnell v. Wilcox*, 1 Scam. 353; *Bruner v. Manlove*, Id. 156 [36 Am. Dec. 551]; *Bennett v. Farrar*, 2 Gilm. 598; *Gray v. McCance*, 14 Ill. 347; *McGhee v. Wright*, 16 Id. 555; *Minter v. Crommelin*, 18 How. 87; *Cooper v. Roberts*, Id. 173. This position is not controverted by the plaintiff, and cannot be successfully. I will, for the purpose of this investigation, treat the patent sought to be impeached as issuing by virtue of a judicial determination of the land-officers, and consequently ranking with a judgment in point of verity.

I have made very diligent search through the English and American authorities at my command, to see to what extent courts of equity have granted relief against patents and judgments obtained by fraud. I find the rule generally stated, that relief may always be had in such cases. Thus Justice McLean, delivering the opinion of the supreme court of the United States in the case of *Stoddard v. Chambers*, 2 How. 318, says: "It is true, a patent possesses the highest verity. It cannot be contradicted or explained by parol; but if it has been fraudulently obtained, or issued against law, it is void. It would be a very dangerous principle to hold that a patent should carry the legal title, though obtained fraudulently or against law. Fraud vitiates all transactions. It makes void a judgment, which is a much more solemn act than the issuing of a patent:" See also *Polk v. Wendal*, 9 Cranch, 98; *Jackson v. Hart*, 12 Johns. 77 [7 Am. Dec. 280]; *Jackson v. Lawton*, 10 Johns. 23 [7 Am. Dec. 311]. It is useless to multiply authorities; the same general doctrine is held through them all; yet I regret to say that I have been able to find but one arising upon a pre-emption case, and there the entry was set aside because it was allowed upon lands clearly not within the jurisdiction of the officers, and not for fraud: *Wilcox v. Jackson*, 13 Pet. 498.

In regard to granting relief against judgments and decrees of courts, it is stated in 1 Maddock's Chancery, 300: "If a verdict has been obtained by fraud, a court of equity will give relief."

"So if a judgment at law be obtained against conscience, a court of equity will decree the party to acknowledge satisfaction on that judgment though he has received nothing."

"A decree obtained by fraud may be set aside, not by a rehearing or appeal, but upon an original bill in the nature of a bill of review. An order in lunacy may be set aside by bill if obtained by fraud." In support of this doctrine, he cites *Barnesly v. Powel*, 1 Ves. sen. 289; *Richmond v. Tayleur*, 1 P. Wms. 734; *Loyd v. Mansell*, 2 Id. 73; *Sheldon v. Fortescue Alande*, 3 Id. 111; see also *Mariot v. Mariot*, 1 Stra. 666.

The case in 1 Ves. sen. 289 [*Barnesly v. Powel*], was the probate of a will in the exchequer which was afterwards found to be a forgery. Lord Chancellor Hardwicke decreed that no use should be made of the will, and the defendant should consent to a revocation of the probate. He held that a court of equity may decree satisfaction to be acknowledged of a judgment obtained against conscience, and that a person obtaining a fine by fraud may be decreed a trustee.

In the case in 1 P. Wms. 734 [*Richmond v. Tayleur*], a bill was filed to set aside a decree obtained. The chancellor said that "if fraud or surprise upon the court had been proved, he would have set aside the decree." This, however, was a decree against an infant.

The case in 2 P. Wms. 73 [*Loyd v. Mansell*], was a bill to set aside an absolute decree, signed and enrolled, alleging fraud in the same, in the manner of obtaining service by making a false affidavit that the defendant was gone beyond sea, etc. The defendant pleaded the decree in bar. The lord chancellor says: "All these circumstances of fraud ought to be answered, which the defendant has been so far from doing, that he only pleads that decree and report as a bar which the plaintiff seeks to set aside; and the decree being signed and enrolled, the plaintiff has no other remedy; and if these matters of fraud laid in the bill are true, it is most reasonable that the decree should be set aside."

It was objected that according to this rule a decree might be set aside by an original bill.

His lordship replied: "Such a gross fraud as this was an abuse on the court and sufficient to set aside any decree."

The case in 3 P. Wms. 111 [*Sheldon v. Fortescue Alande*], was as follows: The committee of a lunatic obtained an order that the profits of the lunatic's estate should be applied to his maintenance, without stating a definite sum. The committee and lunatic both died. The administrator of the lunatic filed a bill against the administrator of the committee for an account. The order is pleaded in bar. The chancellor, after discussing the whole case, concludes his opinion: "I admit even a decree, much more an interlocutory order, if gained by collusion, may be set aside on a petition; *a fortiori* may the same be set aside by bill."

The case in 1 Stra. 666 [*Marriot v. Marriot*], merely holds that after the probate of a will, a court of equity may inquire into the fairness of a residuary devise of personal estate.

In Adams's Equity, 419, it is said: "A bill to impeach a decree for fraud used in obtaining it sufficiently explained its own character. It may be filed without leave of the court, because the alleged fraud is the principal point in issue, and must be established by proof before the propriety of the decree can be investigated; and where a decree has been so obtained, the court will restore the parties to their former situation, whatever their rights may be." See also 1 Story's Eq. Jur., sec. 252; *Reigal v. Wood*, 1 Johns. Ch. 403, where Chancellor Kent cites with approbation *Barnsly v. Powel*, 1 Ves. sen. 284, 289.

From my investigation of this question, I have no doubt that a judgment or decree of a court, or a patent issuing in virtue of a decision of the land-officers, even where the courts and officers act clearly within the sphere of their several jurisdictions, may be impeached in equity for fraud or collusion in obtaining it. Yet it has caused me much embarrassment to decide whether the reception of false evidence upon the merits of the case, in which the decree is sought to be set aside, is such fraud as will be relieved against. As a general rule in judgments and decrees rendered by courts governed by the common law, or systems of practice founded upon it, I have no hesitation in saying that it would not. Such courts, and the parties litigating in them, have ample means to protect themselves against the imposition of false testimony. The right of cross-examination and impeachment has always been deemed a sufficient safeguard in this respect. New trials, even, will not be granted simply on the ground of false evidence having been admitted.

The nearest approach to granting relief against a judgment

because it was founded upon false testimony upon the merits, that I have been able to find, is the case in 1 Ves. sen. 284 [*Barnesly v. Wood*], above cited, where a will was proved, and the probate decree subsequently set aside on a bill alleging the will to be a forgery. But that case has special features which destroy it as an authority on the point I am considering. The method of obtaining the probate in that case was to get from the next of kin, by fraud, an agreement that he should do all acts demanded of him, and then obtaining under the agreement a special proxy confessing the allegations upon which was founded the sentence of probate. The court of equity operated first upon the fraudulent agreements, and through them upon the decree of probate, and finally upon the will.

The land-officers, in the case at bar, were authorized to hear and determine the question as to whether the pre-emptor had settled upon the lands prior to the survey: This proof was as much a part of the pre-emptor's case as the subsequent proof necessary to bring him within the act of 1841, because without the one he could not go into the other. The counsel for the state endeavors to make a distinction between the preliminary fact of settlement before the survey, and the regular facts under the pre-emption act, on the ground that it is by virtue of the prior settlement that the land-officers have jurisdiction over the school sections at all, and that in deciding facts upon which to found their jurisdiction, their decision should not be as final as where the decision is in a matter where the jurisdiction is defined by law; but it is difficult to sustain this distinction upon principle. In either case, the facts may be contested, and must be judicially determined, placing the decision upon the same footing in each.

But how does the state stand upon the pleadings in this case? It does not follow that because a court of equity can set aside a judgment obtained by fraud, that it will do so upon the suggestion of the fraud alone. I apprehend that in an application to equity of this character as well as in any other, it must be made to appear that the plaintiff has no remedy at law adequate to his protection. How is it here? It does not appear that the state was not a party to the proceedings in the land-office, although the counsel on both sides argue the case upon the supposition (which was probably true) that the state had no notice and was not heard; nor does it appear that the state was left in ignorance of the proceedings

in the land-office until too late to make application to that tribunal for redress; both of which facts were essential to the plaintiff's bill, or, as in this case, his reply. If the plaintiff had notice, and contested, or had an opportunity to contest and did not take advantage of it, the admission of false testimony would not be sufficient ground for relief, because, as before shown, the privileges of cross-examination and impeachment are ample protection against such practices. If the plaintiff was aware of the decision of the land-office at any time during the pendency of the matter therein, an application to any of the land-officers in whose department the case might have been, setting forth the facts, would have procured a rehearing and a detection of the fraud. If the plaintiff knew of the decision against its interest, and allowed the time to elapse in which it could have obtained relief in the same court without appealing to that tribunal, I think its negligence is a good answer to an action of this nature. There can be very little doubt that if the case was still pending in the land-office, this court would turn the plaintiff over to that tribunal for relief, because it would have ample power to grant it. It is only when the plaintiff, without any default of his own, is placed in a position that the law courts cannot afford him adequate redress, that this court will interfere, and for the purpose of this investigation we must place the land department of the United States in the category of law courts.

Fully appreciating the difficulties surrounding a correct decision of the several questions presented, I have endeavored to so qualify my reasoning as to avoid trenching upon any settled principle of the law, or experimenting in new or doubtful ones, and also to confine the decision to the particular facts presented by the pleadings; and being of the opinion that the reply is defective in the particulars suggested, a court of equity should not take cognizance of the case.

The demurrer was well sustained, and the judgment is affirmed.

POWER OF STATE TO TAX PROPERTY within its borders: See *People v. Coleman*, 60 Am. Dec. 581; *Harrison v. Mayor of Vicksburg*, 41 Id. 633; *Battle v. Mobile*, 44 Id. 438, and notes to these cases.

STATE COURTS CANNOT INTERFERE WITH OR CONTROL the officers of the general government in the disposal of public lands: *Lewis v. Lewis*, 43 Am. Dec. 540.

CONTEST BETWEEN CITIZENS OF STATE, respecting title to lands derived from the federal government lying within the state, must be determined by

the state courts, though the construction of an act of congress is involved: *Perry v. O'Hanlon*, 49 Am. Dec. 100.

STATE HAS UNCONTROLLED JURISDICTION over all property, real and personal, within its territory: *Smith v. Eaton*, 58 Am. Dec. 746; *People v. Coleman*, 60 Id. 581.

JURISDICTION OF STATE COURTS over cases arising under federal laws: See note to *Teall v. Felton*, 49 Am. Dec. 358.

PATENT TO LANDS MAY BE IMPEACHED for illegality or fraud, and the question is examinable as well at law as in equity: *Hit-tue-ho-mi v. Watts*, 45 Am. Dec. 308, and note 309. But for matter *aliunde*, a patent can only be impeached by direct suit in equity: *Nowell v. Caunn*, 8 Id. 742, and note 746.

LAND-OFFICERS ACT JUDICIALLY, and their decision is final and binding, in cases of pre-emption rights, except in cases of fraud: *Lewis v. Lewis*, 43 Am. Dec. 540; *Lamont v. Stimson*, 62 Id. 696; and for citations in this series *pro* and *con*, see notes to these cases.

EQUITY WILL RELIEVE AGAINST DECISION of land-officer when procured through fraud: *Lamont v. Stimson*, 62 Am. Dec. 696, and note 701. The principal case is followed in *State v. Stevens*, 5 Minn. 521, where the court say: "The decision in this case must be the same as that in the case of *State v. Bachelder*, argued at this term, as both involve the same questions. Our views are given in that case *in extenso*, and it is unnecessary to repeat them here."

STATE OF MINNESOTA TOOK GRANT of school sections incumbered by the claims of such persons as had made settlements upon them prior to the survey, and could bring themselves within the resolution and the pre-emption act, and the land-officers had the right and jurisdiction to determine: 1. Whether the lands had been settled upon prior to such survey; 2. If they were imposed upon by fraudulent practices, and their decision thus improperly obtained, equity would, upon a proper showing, set it aside, but the mere admission of false evidence would not be sufficient proof of fraud for this purpose; 3. That as it did not appear that the state was not a party to the proceedings before the land-office, nor that it was left in ignorance of them until too late to seek redress in that tribunal, equity had no jurisdiction to vacate a patent granted upon the decision of the land-officers: *State v. Bachelder*, 7 Minn. 135, and 139, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Foster v. County Commissioners etc.*, 7 Minn. 148, to the points contained in the first paragraph of *syllabus, supra*.

UNITED STATES LAND-OFFICERS ACT JUDICIALLY, and their decisions are as final as other courts: *Monnette v. Cratt*, 7 Minn. 251, citing the principal case.

ACTION BROUGHT UNDER MINNESOTA STATUTE to determine adverse claim, interest, or estate in land, must be brought by a party in actual possession: *Murphy v. Hinds*, 15 Minn. 183. But it does not follow that any of the remedies furnished by equity by parties not in possession are by the statute cut off, or in any way interfered with: *Hamilton v. Batlin*, 8 Id. 405, both citing the principal case.

SEPARATE ACTION CANNOT BE MAINTAINED in equity to set aside a judgment of a court of competent jurisdiction because it has been procured by means of false testimony, where the court rendering it has full power to afford adequate relief upon an application in the same suit or proceeding: *Johnston v. Paul*, 23 Minn. 49; and see also, on this point, *McNair v. Toler*, 21 Id. 183, both citing the principal case.

GENERAL DEMURRER TO PLEADING, that it does not contain facts sufficient to constitute a cause of action or defense, is sufficient without further specifications: *Monnette v. Cratt*, 7 Minn. 242, citing the principal case.

WHERE DEFENDANT DOES NOT DISCLAIM BUT ASSERTS the legal title as being in him, the plaintiff may, in reply, set up, in avoidance of defendant's legal title, facts which would be sufficient ground for equitable relief as against such legal title, and which would be sufficient reason why the equitable right of plaintiff should prevail over the legal title of defendant: *School District No. 73 of Scott County v. Wrabet*, 31 Minn. 79, citing the principal case.

PARRET v. SHAUBHUT.

[5 MINNESOTA, 323.]

EQUITABLE DOCTRINE THAT PARTY MAY HAVE RELIEF from his acts when done in ignorance of facts has no application to a question of priority of mortgage liens, arising from want of notice, and which must be decided by registry acts alone, at least when the rights of third parties would be affected. Such doctrine obtains in cases of sales of property, where some fact known to the vendor and unknown to the vendee, which he is under no obligation or duty to discover, and which would materially influence the sale, is suppressed.

WHEN PARTY DESIRES TO PURCHASE OR TAKE INCUMBRANCE upon land, his guide to the title is the records of the county; and the record of a mortgage is notice of its contents only so far as the record discloses it. If the record contains any instrument which is not authorized to be recorded, either from the nature of its subject-matter or a defect in its execution, it is a mere nullity, and is not notice for any purpose. Therefore, where the statute requires that a mortgage be executed in the presence of two witnesses, and the record discloses that only one was present at its execution, the registry is no notice to any one, and a mortgage subsequently executed, and recorded properly witnessed, is entitled to priority.

THE opinion states the facts.

Tourtellotte and Pitcher, for the plaintiffs in error.

Willard and Barney, for the defendants in error.

By Court, FLANDRAU, J. On the eighth day of June, 1858, Parret and wife executed a mortgage upon the land in question to Charles Thompson, to secure the sum of one thousand dollars, payable in one year, which mortgage was properly recorded.

On the fourteenth day of May, 1859, Parret and wife executed another mortgage upon the same premises to John J. and Henry Shaubhut, to secure the sum of four hundred and forty-nine dollars and sixty-nine cents, payable in two months, which mortgage was properly executed and delivered; but in

the recording of the same the register of deeds omitted one of the attesting witnesses, and the same appeared upon record to have been executed in the presence of but one witness.

On the fifteenth day of July, 1859, Thompson voluntarily canceled his mortgage of June 8, 1858, and took a new one for a greater amount, with interest at three per cent per month. The consideration for the second mortgage taken by Thompson was the first debt of one thousand dollars, with accumulated interest. This mortgage was duly recorded on the sixteenth day of July, 1859.

At the time Thompson took this second mortgage he had no notice of the existence of the Shaubhut's mortgage, except such as was conveyed to him constructively by the records.

The contest is for priority of lien between the mortgage of the Shaubhuts and the second mortgage of Thompson. On the trial below, before the court without a jury, several questions were raised by the defendant Thompson. He claimed to have acted, in canceling his mortgage, in ignorance of the fact that another mortgage had intervened in favor of third parties; and also that he was induced by fraud to cancel his first mortgage. Both of these points were found against him by the court, and we think correctly, upon the theory which obtained with the court in the decision of the case. If the Shaubhut mortgage was well recorded, Thompson could not successfully allege ignorance of its existence. The equitable doctrine that a party may have relief from his acts when done under an ignorance of facts has no application to questions of this character, at least when the rights of third parties would be affected, but obtains in cases of sales of property, where some fact known to the vendor and unknown to the vendee, which would materially influence the sale, is suppressed—as if a man should sell a house, situated in a distant town, which he knew at the time to be burned down, and of which fact the vendee was ignorant—the vendee in such case would be entitled to a redhibition of the contract. In such cases the fact suppressed must be peculiarly within the knowledge of one party and impose upon him an obligation in good conscience to disclose it, and not within the knowledge of the other, who must also be free from any obligation or duty to discover it: 1 Story's Eq. Jur., secs. 208–217. This case does not present a question involving this doctrine. The ignorance of the defendant Thompson, as to the mortgage of the Shaubhuts, must be decided upon the registry acts alone.

The claim that Thompson was induced to cancel his first mortgage by fraud is not sustained by the proof, and the court was clearly right in finding both these points against him.

The real question in the case is, whether the record of the Shaubhut mortgage was notice for any purpose. The statutes of this state concerning the execution of conveyances of real estate require that they "shall be executed in the presence of two witnesses, who shall subscribe their names to the same as such:" Comp. Stats., p. 398, sec. 8. To make a deed of any interest in real estate good as against subsequent purchasers, in good faith and for a valuable consideration, of the same real estate, the deed must be recorded: Id., p. 404, sec. 54. To entitle a deed to record, it must be executed and acknowledged by the party executing the same, as required by law: Id., p. 404, sec. 57; and there is the further provision on page 405, section 60, making it a misdemeanor for any register of deeds to record "any conveyance, mortgage, or other instrument, by which any interest in real estate is or may be in any way affected, unless the same shall have been duly signed and executed, and acknowledged according to law."

It is competent for the government to prescribe rules for the conveyance of lands within its jurisdiction, whether by deed, will, or otherwise, and it can impose such restrictions as are deemed for the best interests of its subjects. It may provide that the title to lands shall not pass unless the deed or will is upon paper stamped by the state. It may declare that the instrument shall be attested by one, two, or more witnesses; and none of these requirements involve a greater exercise of authority than to say that the conveyance shall be in writing, as there is no reason, except the statutes, why a man should not pass his real as well as his personal estate by parol merely.

That statutes requiring certain solemnities to attend the execution of conveyances are imperative, and must be complied with to give validity to them, is illustrated by the action of courts in annulling wills and conveyances of land frequently for the want of a seal or other essential formality. That our legislature has always considered a departure from the statute forms as invalidating conveyances, is found in the fact that a series of acts have been passed year after year to save such as are defectively executed, while the same legislatures have steadily adhered to the forms first prescribed, and even added greater restrictions: Act of March 4, 1854, Comp

Stats. 402; Act of February 6, 1856, Comp. Stats. 406; Act of July 26, 1858, Comp. Stat. 403, 404; Act of August 3, 1858, Comp. Stats. 404, 405.

When a party desires to purchase or take an incumbrance upon land, his guide as to the title is the records of the county, and it is a well-settled rule that the record of a deed is notice only of its contents so far as the record discloses it. If the record contains any instrument which is not authorized to be recorded, either from the nature of its subject-matter or a defect in its execution, it is a mere nullity, and is not notice for any purpose. In 1 Story's Equity Jurisprudence, section 404, this language is used in treating of the constructive notice conveyed by records: "But this doctrine as to the registration of deeds being constructive notice to all subsequent purchasers is not to be understood of all deeds and conveyances which may be *de facto* registered, but of such only as are authorized and required by law to be registered, and are duly registered in compliance with law. If they are not authorized or required to be registered, or the registry itself is not in compliance with the law, the act of registration is treated as a mere nullity; and then the subsequent purchaser is affected only by such actual notice as would amount to a fraud."

In *Frost v. Beekman*, 1 Johns. Ch. 300, Chancellor Kent says, upon the same subject: "The better opinion in the books seems to be that it would not be notice, and that equity will not interfere in favor of an incumbrancer who has not seen that his mortgage was duly registered:" *James v. Morey*, 2 Cow. 247 [14 Am. Dec. 475]; 2 Hilliard on Real Property, 454, sec. 43. "In general, the recording of a mortgage is notice both of the debt and the lien to all parties. But without legal acknowledgment or proof, it is a nullity:" 1 Hilliard on Mortgages, 668, sec. 6. Chancellor Kent says: "In several of the states [naming them], two witnesses are required to the execution of the deed; and probably the deed would not be deemed sufficiently authenticated for recording without the signatures of the two witnesses:" 4 Kent's Com. 504.

The judge who tried the cause below, in speaking of this branch of the case, says: "The attestation forms no part of the deed, and the notice of record would have been as valid to all intents and purposes if it had presented no attesting witness at all, as it would had it been attested by two witnesses, as is usually the case." In this view, the judge clearly erred, and it is difficult to see by what means he could have arrived

at such a conclusion. The statute is imperative that "the deed shall be executed in the presence of two witnesses, who shall subscribe their names to the same as such," and the register is expressly forbidden to record "any conveyance, mortgage, or other instrument," etc., "unless the same shall have been duly signed and executed, and acknowledged according to law." If there is no necessity for witnesses, there can be none for the acknowledgment or the signature, and the statute is ignored or repealed. The court not having cited any authorities in support of his position in this respect, we think he must have overlooked these statutory requirements.

The intention of the legislature in regard to the necessity of having two witnesses to a deed or mortgage is much strengthened by the succeeding chapter of the old revised statutes, in which the provision is found, which is published on pages 405, 406, of the compiled statutes, and which was passed at the same session of the legislature. In providing for the registration of bonds, contracts, or agreements concerning any interest in lands, it expressly declares that one attesting witness shall be sufficient to entitle them to record, proving that greater solemnity was required in the execution of instruments conveying an estate in lands than such as merely agreed to do so.

We think the record of the Shaubhut mortgage was no notice to any one, and that the mortgage of Thompson, subsequently executed and recorded, is entitled to priority over it, no actual notice having been conveyed to Thompson of its existence. The judgment of the court below is reversed, and the case remanded, with directions that a judgment be entered in that court which will fully secure the rights of said Thompson under his mortgage of July 15, 1859, as first incumbrancer of the premises, and the rights of the plaintiff as second incumbrancer thereof; and that the premises be sold to pay off said incumbrances in their order, with the usual decree in such cases.

EQUITY WILL NOT RELIEVE FROM ACT on ground of ignorance of facts which the party could have ascertained by the exercise of due diligence: *McDaniels v. Bank of Rutland*, 70 Am. Dec. 406, and note 414.

REGISTRY IS NOTICE OF TENOR AND EFFECT of an instrument recorded, only as it appears of record: *Shepherd v. Burkhalter*, 58 Am. Dec. 523; *Chamberlain v. Bell*, 68 Id. 260, and notes to these cases. Everything essential to title under statute must appear of record: *Benson v. Smith*, 66 Id. 285, and note 289. And a mortgage recorded with the name of one witness only conveys no legal estate: *Bank etc. v. Carpenter*, 28 Id. 616. The recording of an instrument not entitled to be recorded does not give notice: *James v. Morey*, 14 Id. 475, and note 512; *Main v. Alexander*, 47 Id. 732, note 735.

SUBSEQUENT INCUMBRANCERS OF LAND by mortgage are bound by nothing more than the record discloses, unless express notice is proved: *Whittacre v. Fuller*, 5 Minn. 515; and an unauthorized record is no notice to a subsequent purchaser: *Baze v. Arper*, 6 Id. 234. So a mortgage of lands with only one witness is not entitled to record, and passes no interest in lands: *Thompson v. Morgan*, Id. 295; *Ross v. Worthington*, 11 Id. 443, all citing the principal case.

MINNESOTA STATUTE REQUIRING THAT CONVEYANCE OF LANDS shall be executed in the presence of two witnesses, who shall subscribe their names thereto as such, is imperative, and must be complied with, to give the instrument any validity as a conveyance: *Meighen v. Strong*, 6 Minn. 180, *post*, p. 441; *Gardner v. McClure*, Id. 262; *Thompson v. Morgan*, Id. 295; *Ross v. Worthington*, 11 Id. 441, all citing the principal case.

FOLSOM v. CARLI.

[5 MINNESOTA, 333.]

INDORSER OF PROMISSORY NOTE MAY, at any time after it becomes due, pay the amount to the legal holder, and at once proceed to enforce it against the maker; or in case several judgments have been obtained upon such instrument, against him and the maker, he may pay the judgment against himself, take an assignment of that against the maker, and enforce it in his own behalf. The Minnesota statute does not change this rule.

SHERIFF IS NOT REQUIRED TO STATE IN HIS RETURN the particular facts constituting a levy; a general return, that he has "levied upon" the property is sufficient, and cannot be disputed, except in a direct proceeding against the officer or his sureties for a false return. When the judgment is a lien upon real property, a formal levy upon such property is not required, and the provision of the statute, that "until a levy property is not affected by the execution," applies to a levy upon personal property only.

UNDER MINNESOTA HOMESTEAD EXEMPTION LAW, as it existed prior to 1860, "where a judgment was rendered and the property sold, the lien of the judgment attached to the homestead as well as other real property of the judgment debtor, and the exemption applied only to a sale on execution, while the homestead was occupied by the debtor or his family, but did not affect the lien:" therefore a grantee of the judgment debtor took the property subject to the lien of the judgment.

OBJECTION TO ANSWER FOR WANT OF VERIFICATION is waived by receiving and retaining that pleading without objection.

THE opinion contains the facts.

Burt, for the appellants.

Brisbin, for the respondent.

By Court, EMMETT, C. J. The indorser of a promissory note may, at any time after it becomes due, pay the amount to the legal holder, and at once proceed to enforce it against the maker, or in case several judgments have been obtained on such an instrument, against him and the maker may pay

the judgment against himself, take an assignment of that against the maker, and enforce it in his own behalf. These are propositions too well settled to require a reference to authorities, and are fully sustained by the cases referred to in the appellants' brief. And they necessarily dispose of the first branch of the plaintiff's case, unless our statute—which authorizes a plaintiff, at his option, to include in one action all persons severally liable upon the same obligation or instrument, including the parties to bills of exchange or promissory notes, and sureties on the same: Com. Stats., p. 535, sec. 36—changes the law as to this state. We cannot believe, however, that any such change was intended. The legislature sought, by the provision referred to, merely to avoid a multiplicity of actions, but never intended thereby to put it in the power of the holders of such instruments to change or in any way affect the legal or equitable rights of the persons liable thereon, in their relations or responsibilities to each other, by any course or form of action they might pursue. The holder of the note, on which the judgment referred to in the pleadings in this case was rendered, might, notwithstanding this statute, have obtained separate judgments against both makers and indorser, in which event, as we have before stated, Folsom, the indorser, might have paid the judgment against himself, taken an assignment of the judgment against the makers, and enforced the latter to reimburse himself. And should he now be deprived of this right as against the makers who are liable over to him, and be driven to the trouble and expense of another action simply because the holder of the note saw proper to proceed under the statute and obtain a judgment against both makers and indorser in one action?

The indorser has, in this case, paid the judgment and taken an assignment to a third person, who enforced it against the makers. This he had a perfect right to do, even without the intervention of a third person as assignee. He might have taken the assignment directly to himself.

But the plaintiff further claims that the execution afterwards issued to enforce this judgment was never, in fact, levied upon the real estate in controversy. To this the defendants answer, that the sheriff returned generally that he had "levied upon" the property—that such general return is sufficient, and its truth or falsity cannot be inquired into in this action.

This court held in *Tullis v. Brawley*, 3 Minn. 277, and

Rohrer v. Turrill, 4 Id. 407, that a sheriff was not required to state in his return the particular facts constituting a levy; that a general return that he had "levied upon" property was sufficient, and could not be disputed, except in a direct proceeding against the officer or his sureties for a false return; and in the former case we also held that where a judgment was a lien upon real property, a formal levy upon such property was not required, and that the provision of statute, that "until a levy property is not affected by the execution," applies to a levy upon personal property only.

These decisions fully dispose of the second branch of the plaintiff's case, leaving only the question as to the lien of the judgment upon the homestead of the judgment debtors.

The real estate in controversy at the time the judgment above spoken of was rendered and docketed was occupied by one of the judgment debtors as a homestead, and had been set off to him as such. It was afterwards conveyed to the plaintiff in this action, but before the levy and sale mentioned in the pleadings. It is now urged that because the property was, as a homestead, exempt from sale in the hands of the judgment debtor, it remained so exempt in the hands of his grantee, and that the judgment was never a lien upon it.

We cannot adopt this view of the case. The statute in force at the time made the judgment a lien from the time of docketing, on "all the real property of the judgment debtor in the county, owned by him at the time, or afterwards acquired:" Comp. Stats., p. 566, secs. 76, 77. And although by another provision of the statute (R. S. 1851, p. 363, sec. 93), the homestead owned and occupied by the debtor as a residence was exempted from sale on execution, yet it does not appear to affect the lien of the judgment given by the sections before referred to. This exemption from sale was continued even after the death of the judgment debtor, so long as the premises were occupied as a homestead by the widow (she continuing unmarried), and until the youngest child attained its majority, or some one of them continuing to occupy the same as a homestead. It will be observed, however, that the statute, without mentioning the lien of the judgment, merely suspended the sale of the homestead so long as it was occupied as such by the debtor, his widow, or minor children; but the inference is clear, from the language used, that so soon as it ceased to be thus occupied—when the debtor, his widow, or minor children abandoned it as a residence, or if a widow married again, and

the children all attained full age—the exemption ceased, and the lien of the judgment could be enforced by a sale on execution. Occupancy as a residence, by some one or more of the persons named, is made a condition for the continuance of the exemption, and the exemption was but a personal privilege, which the parties for whose benefit it was intended might lose by abandonment.

We hold that under the exemption law as it existed at the time this judgment was rendered and docketed, and the property sold, the lien of the judgment attached to the homestead as well as to any other real property of the judgment debtor—that the exemption of the homestead was only an exemption from sale on execution, while occupied by the debtor or his family, but did not affect the lien of the judgment. That when McKusic, the judgment debtor, abandoned the property as a residence, and conveyed it to another, the exemption ceased, and the judgment creditor had then the right to enforce his lien by a sale of the premises on execution, and that the grantee, Carli, took the property, subject to the lien of the judgment.

It would seem, also, that the legislature has given a similar construction to this law by the act of March 10, 1860; for in providing that a judgment debtor may now remove from or sell the homestead, without subjecting it thereby to a sale on execution, it was found necessary to deprive judgments of any lien upon the homestead.

The point which the plaintiff makes as to the verification of the answer, we consider as waived by receiving and retaining that pleading without objection. But giving the objection full force, it would not avail the plaintiff in this action, for under the view we have taken of the case, he would not be entitled to a judgment had his whole case been admitted by the answer.

Judgment reversed.

RIGHTS OF SURETY WHO PAYS JUDGMENT AGAINST HIS PRINCIPAL: *Connely v. Bourg*, 79 Am. Dec. 568.

RETURN OF OFFICER, SUFFICIENCY OF: See *Webb v. Bumpass*, 33 Am. Dec. 310; *Hyde v. Barney*, 44 Id. 335; *Hand v. Grant*, 43 Id. 528; *Blanchard v. Blanchard*, 38 Id. 710; *Porter v. Byrne*, 71 Id. 305.

RETURN OF OFFICER IS CONCLUSIVE on parties to the record, when collaterally called into question: *Reynolds v. Ingersoll*, 49 Am. Dec. 57; *Knowles v. Lord*, 34 Id. 525; *Diller v. Roberts*, 15 Id. 578; *Whitaker v. Sumner*, 19 Id. 298; and cannot be contradicted except in an action against the officer for a false return: *Stinson v. Snow*, 25 Id. 238, and note.

HOMESTEAD IS SUBJECT TO LIEN of judgment in Wisconsin, and may be sold under execution after it has ceased to be such by the voluntary act of the judgment debtor: *Hoyt v. Howe*, 62 Am. Dec. 705, and note.

SHERIFF IS REQUIRED TO RETURN ONLY ULTIMATE FACTS, and where the return certifies that the sheriff has levied upon all the right, title, and interest of defendant in the writ, in and to all the crop of wheat, oats, and barley seeded and growing on the land, describing it, the return is sufficient: *Hosfeldt v. Dill*, 28 Minn. 473, citing the principal case.

NO FORMAL LEVY OF EXECUTION upon real estate is necessary under the statute: *Bidwell v. Coleman*, 11 Minn. 89; *Knox v. Randall*, 24 Id. 496, both citing the principal case.

PAYING SURETY MAY COMPEL CREDITOR to vest the legal title in him by assigning the debts and securities to him. This the creditor may do voluntarily, and the assignee may then use them, and through them indemnify himself for the amount paid as surety: *Felton v. Bissel*, 25 Minn. 19, citing the principal case.

OCCUPANCY OF HOMESTEAD AS RESIDENCE is necessary by a debtor and his family, in order to entitle him to the exemption provided by the statute: *Tilston v. Mallard*, 7 Minn. 519. And a lien of a judgment attaches to a homestead, and the exemption thereof is only an exemption from sale on execution during the occupancy of the debtor and his family: *Barton v. Drake*, 21 Id. 304, both citing the principal case. Judgment recovered prior to the statute of 1860 became a lien on the homestead: *Burwell v. Tullis*, 12 Id. 575, citing the principal case.

HOMESTEAD, IN ITS ORDINARY SIGNIFICATION, conveys the idea of the place of residence or dwelling of its owner. Such is the sense in which the word was used in the Minnesota statute of 1858: *Kelly v. Baker*, 10 Minn. 156, citing the principal case.

DODGE v. HOLLINSHEAD.

[6 MINNESOTA, 25.]

CERTIFICATE OF ACKNOWLEDGMENT TO DEED, regular upon its face, is not conclusive evidence of the matters contained therein.

IT IS NECESSARY TO CONSTITUTE VALID CONVEYANCE of real estate by a married woman, and of the essence of the execution of the instrument, that her acknowledgment be taken separate and apart from her husband, and that she acknowledge that she executed such instrument freely and without any fear or compulsion from any one.

MORTGAGE WILL NOT BE SUSTAINED which defrauds a wife of her property, although her signature was obtained without any fraudulent representations on the part of any one, if it appears that the contents of the mortgage were unknown to her at the time of signing, that she supposed it to be other property than it actually was, that she never received any consideration for signing the mortgage, that her acknowledgment was taken in no manner whatever, and that she did not intend to incumber or convey her homestead.

THE opinion contains the facts.

Sanborn and Lund, for the plaintiff in error.

Horn and Galusha, for the defendant in error.

By Court, ATWATER, J. The counsel for the plaintiff in error claims that the certificate of the acknowledgment to a deed, affixed thereto by an officer empowered to take acknowledgments, and regular upon its face, is conclusive evidence of the matters contained therein, and cannot be aided or disproved by parol testimony. Such a rule may have been adopted in some of the states, but certainly not in others, as see *Jackson v. Ingraham*, 4 Johns. 161; *Van Bracklin v. Fonda*, 12 Id. 468 [7 Am. Dec. 339]; *Jackson v. Perkins*, 2 Wend. 308; *Morris v. Keyes*, 1 Hill (N. Y.), 540. But in this state, we think the statute conclusive on the subject. Section 26, page 400, compiled statutes, provides that "all conveyances and other instruments authorized by law to be recorded, and which shall be acknowledged or proved, as provided in this chapter, . . . may be read in evidence in any court within this territory, without further proof thereof; but the effect of such evidence may be rebutted by other competent testimony." In order to introduce the deed, etc., in evidence, therefore, it must have been acknowledged, when it becomes *prima facie* evidence of the matters to which it relates, but the legislature has provided that such evidence shall not be conclusive. It was strenuously urged upon the argument, that to permit the certificate of the officer taking the acknowledgment to be contradicted by parol proof, would be productive of the most pernicious results, and greatly tend to unsettle the title to real estate. The objection is not without force, although strong reasons may be urged in opposition to this view; yet the regulation of this matter is, doubtless, legitimately within the scope of the law-making power, and where the legislature has prescribed the rule which is to govern, courts are not at liberty to disregard it.

As a married woman, at common law, is regarded as incapable of making any contract, so she, of course, can only convey her real estate as authorized by the statute. The old method of alienation or grant by the wife, by fine and recovery, attended by all the formalities and solemnities usual in courts of justice, illustrates the extreme caution exercised with reference to these acts of the wife; or rather, the protection thrown around her by the courts in the act of disposing of her real estate. For the main object of this somewhat troublesome and expensive proceeding was not for the purpose of restrain-

ing the wife in the disposition of her property, but to see that no improper influences were inducing thereto. More recent legislation has dispensed with the unnecessary forms which formerly obtained, but carefully preserved the substance, in providing in nearly or quite all the states, that some public officer should certify to an examination of the wife apart from the husband, and that she executed the instrument of her own free-will, and without fear or compulsion. And upon no branch of the law relating to the rights of persons have the decisions of the courts been more emphatic and uniform than in holding that the conveyance of real estate by a *feme covert* must be strictly in accordance with statute, in order to give it validity.

This is an action of ejectment, and the plaintiff must stand or fall upon his legal title, and cannot invoke the equitable power of the court to enforce the contract which it is claimed the defendant, Mrs. Hollinshead, has entered into. And indeed, were the form of the action different, no equities are shown as against the defendant in error, since she received no consideration for signing the mortgage, nor, in fact, was the mortgage given in consideration of an advance of money, but to secure an old debt or claim against the husband of Mrs. Hollinshead and another. Our inquiry herein, therefore, must be limited to the question as to whether the defendant in error has conveyed the premises in dispute in the manner required by law.

Our own statutes have, in several instances, recognized the disability under which the married woman labors in the disposition of her real property, and the undue influence liable to be exercised upon her by her husband in regard thereto; and have provided that she may dispose of it upon one condition (the consent of the husband), and have pointed out the manner in which such conveyance shall be made. The particularity with which the form of an acknowledgment of a conveyance of real estate by a married woman is described, and the fact that in the several instances where such conveyance is spoken of, whether as made directly or through the intervention of an attorney, this form of acknowledgment is required, is strong evidence to show that the legislature considered this as of the essence of the execution of the instrument, and necessary to constitute a valid conveyance. In the execution of a power by a married woman by grant, such grant shall be acknowledged by her on a private examination.

as in case of deed, and shall not be valid unless so acknowledged: Comp. Stats., p. 395, sec. 44. The power to convey her real estate is given to the wife by section 2, page 397, compiled statutes, and the manner in which the instrument shall be executed is prescribed in section 12, page 398, which provides that "when any married woman residing in this territory [state] shall join with her husband in a deed of conveyance of real estate, situate within this territory, the acknowledgment of the wife shall be taken separately, apart from her husband, and she shall acknowledge that she executed such deed freely, and without any fear or compulsion from any one."

And the act of February 24, 1857, authorizing married women to convey real estate by power of attorney (Comp. Stats., p. 402), makes the same provision with reference to acknowledgment by the wife, and legalizing conveyances theretofore made, where the examination of the wife had not been taken separate and apart from her husband. The fact that a special act was deemed necessary to legalize such conveyances affords strong ground for the presumption that in the view of the law-making power, at least, such conveyances were invalid. Nor can there be any stronger reason for requiring such examination in the execution of a power of attorney authorizing another to convey, than where the conveyance is made directly by the wife. The object of the acknowledgment is the same in both cases.

That the acknowledgment required by section 12, above quoted, is to be regarded as an essential part of the execution of the instrument is, I think, further manifest from the language of the next succeeding section. This provides that "when any married woman, not residing in this territory, shall join with her husband in any conveyance of real estate situate within this territory, the conveyance shall have the same effect as if she were sole, and the acknowledgment or proof of the execution of such conveyance by her may be the same as if she were sole." I think the learned judge who tried the case below appropriately remarks on this provision that "this section is evidently based on the fact that the law of other localities on this subject is not similar to our own, and that it is proper to permit a married woman resident elsewhere to convey her property situated here in the manner in which she might convey it if she were unmarried. But when she resides here, and her person is subject to the laws of this

jurisdiction, no such liberty or right is given her. It has been thought best to surround her with safeguards, and to endeavor to counteract and render harmless those peculiar influences to which the marital relation subjects her, by provisions which enable her to have a will, and to exercise it freely."

At the common law, two things were deemed essential to enable a *feme covert* to convey her lands: 1. The concurrence of her husband; and 2. That the act be ascertained in the mode prescribed by law to be voluntary on her part, and not from fear or compulsion of her husband: *Albany Fire Ins. Co. v. Bay*, 4 N. Y. 9. Now, it will be observed that our statute has retained these two requisites in conveyances by married women, the only difference being that the statute has changed the manner in which these requisites are to be ascertained; and there can be no more reason for holding that the private examination of the wife may be dispensed with than that the husband need not be joined. And yet it is universally held that the husband must join in the wife's deed in order to render the same valid. It was held in New York (by a divided court) that the husband need not join in a mortgage of the wife's property; but that was based on their statute, which materially differs from ours, and even there it was not claimed that the common-law rule requiring the concurrence of the husband could be dispensed with, save as provided by statute. And such may be considered the settled rule in all, or nearly all, the states, as well as in England, at this time. Chancellor Kent, in treating of this subject, says: "Upon this view of our American law on the subject, we may conclude the general law to be that the husband must show his concurrence to the wife's conveyance, by becoming a party to the deed, and that the cases in which her deed, without such concurrence, is valid, are to be considered exceptions to the general rule: 2 Kent's Com. 154.

But in fact, if either of these requisites might be dispensed with, there is stronger reason for regarding the acknowledgment of the wife as much the most important, for by reference to the mode of conveyance by fine, it will be seen that the *feme covert* might bar herself and her heirs by a fine levied solely by herself, without her husband, if he did not enter and avoid the estate granted; and the reason given is because she was examined, and had power of the land: *Mary Portington's Case*, 10 Co. 43.

But I find no instance where a conveyance by the *feme covert*.

under that form, has been held good for any purpose without the private examination of the wife. The disability of a married woman to convey her lands by deed was not supposed to arise from want of reason, but because by her marriage she was placed under the power and protection of her husband; and it was upon that ground that the separate examination of such woman on a fine was good, because when delivered from her husband, her judgment was supposed to be free: *Hearle v. Greenbank*, 3 Atk. 712. The reason for this separate examination exists just as strongly at the present day as ever, since the power and control of the husband over the wife is, in theory if not in practice, the same as it has ever been. And as the great object which the common law aimed at was to ascertain whether the wife, in the transfer of her estate or interest in real estate, acted under fear or compulsion of her husband, so has the same been the paramount object in legislative enactments on the subject, and has been recognized in all the judicial determinations which have been made on the question. In *Gillett v. Stanley*, 1 Hill (N. Y.), 121, where the question arose as to conveyance by married women, Bronson, J., in delivering the opinion of the court, says: "There was no such acknowledgment as the statute required for passing the estate of a *feme covert*;" and that "without an acknowledgment on a private examination, etc., the deed was a mere nullity." In *Meriam v. Harsen*, 2 Barb. Ch. 232, the question came directly before the court as to the sufficiency of the acknowledgment by a married woman. The officer certified that "the said Catharine, being examined by me, privately and apart from her husband, acknowledged that she executed the same without any fear, threat, or compulsion of her husband. The word "freely," required by the statute, was omitted, and it was strenuously contended that this was sufficient to invalidate the conveyance. The court held the acknowledgment sufficient, and that it was not necessary that the certificate should be in the precise words of the statute, but clearly intimating that unless the requirements of the statute had been substantially complied with, the conveyance would not have been good.

The statute of New York, it may be remarked, with reference to the acknowledgment of deeds by married women, is precisely the same as our own, but there is a provision declaring that instruments not so acknowledged shall be void. We do not understand, however, that this added anything to the force of the statute prescribing the form of acknowledgment, but

was only declaratory of the effect necessarily resulting from a failure to comply with the statute. As this right or power to convey is created by statute solely, so all the forms or restrictions imposed by the statute in order to its enjoyment must be observed and complied with. The adjudications of the courts of New York upon this question are, therefore, entitled to the same weight as their decisions upon any other subject where the statute law of the two states is the same. And the same is true of the decisions in many other states, whose statutes are nearly, or precisely, the same as our own in this regard. As these decisions are numerous and nearly uniform, it is unnecessary to examine them at length, or to do more than cite some of the most prominent: *Jackson v. Cairns*, 20 Johns. 301; *Jackson v. Stevens*, 16 Id. 109; *Jackson v. Schoonmaker*, 4 Id. 161; *Martin v. Dwelley*, 6 Wend. 9 [21 Am. Dec. 245]; *Meriam v. Harsen*, 2 Barb. Ch. 232; 2 Kent's Com. 167; *Elliott v. Piersol*, 1 Pet. 338; *People v. Galloway*, 17 Wend. 540; *Sanford v. McLean*, 3 Paige, 122 [23 Am. Dec. 773]; *Knowles v. McCamly*, 10 Paige, 346; *Albany Fire Insurance Co. v. Bay*, 4 N. Y. 9; Reeve's Domestic Relations, c. 8; *Sibley v. Johnson*, 1 Mich. 383; *Dewey v. Campau*, 4 Id. 567; *Doe v. Howland*, 8 Cow. 277 [18 Am. Dec. 445]; *Clark v. Graham*, 6 Wheat. 577; *Constantine v. Van Winkle*, 2 Hill (N. Y.), 240; *Evans v. Commonwealth*, 4 Serg. & R. 272 [8 Am. Dec. 711]; *Steele v. Thompson*, 14 Id. 94; *Jourdan v. Jourdan*, 9 Id. 268 [11 Am. Dec. 724]; *Stevens v. Doe*, 6 Blackf. 475; *Mott v. Smith*, 16 Cal. 533; *Johns v. Reardon*, 11 Md. 465.

It is claimed by the plaintiff in error that even if the mortgage was insufficient to convey the legal estate of Mrs. Hollinshead in the premises, she ought not now to be permitted to set up such defense, having long slept upon her rights, and suffered the grantee to act upon the strength of his conveyance without asserting her claim to the property. It appears from the testimony that she first became aware of the fact that these lots were mortgaged in December, 1859, while in Pennsylvania, and that she thought it was then of no use to object. Aside from the fact that the plaintiff claims only a legal interest, and sets up no equities against the defendant, it does not appear that Mrs. Hollinshead has not asserted rights at the first opportunity afforded her, after her knowledge of the existence of the mortgage, nor that since that period the plaintiff has suffered any injury from her neglect or failure to adopt active measures to have her rights litigated. It

is unnecessary, therefore, to decide whether the court would permit a *feme covert* to assert her legal rights (in a case like the one at bar), as against an innocent purchaser, but it certainly would be most safe and prudent for the wife, as soon as informed that her rights are or are likely to be prejudiced in this manner, to take such measures as may be in her power to prevent the injury to herself, and further loss to others.

The evidence in the case is clear and conclusive, that the contents of this mortgage were unknown to Mrs. Hollinshead at the time of signing the same; that she supposed it to be other property than it actually was; that she never received any consideration for signing the mortgage; that her acknowledgment was taken in no manner whatever; and that she never had any intention of incumbering or conveying her homestead. On her part, not the first element existed as the foundation of a valid contract, unless the physical act of affixing her name to the instrument be considered such. It is true, her signature does not appear to have been obtained through any fraudulent representations on the part of any one, yet she is, in fact, defrauded of her property by sustaining the mortgage, and that species of property which the law most jealously guards. And in regard to the disturbance of titles likely to result from holding such a conveyance void (which was strenuously urged as a reason for sustaining the mortgage), we are unwilling to believe that many of the like false certificates have found place upon the records of the state. But if such be the case, it is an urgent reason why the legislature should interfere, by imposing penalties of such severity and certainty as to prevent so flagrant an abuse. And as remarked by the judge who tried the cause, "whatever hardships may exist in this cause, and it is undeniable that one party must suffer, is mainly attributable to the failure of the notary to perform his duty in the manner prescribed by law. And while I do not think that either the notary or the husband of the defendant acted dishonestly in the matter, or willfully intended to deceive or defraud either the plaintiff or defendant, it cannot but be regretted that so grave a business transaction was so carelessly conducted, and so important an official act was so unfaithfully performed."

The judgment below must be affirmed.

CERTIFICATE OF ACKNOWLEDGMENT, admissibility of evidence to explain or vary: See *Smith v. Ward*, 1 Am. Dec. 80, and note 81; *Barnett v. Shackleford*, 22 Id. 100, and note 102; *Bennett v. Paine*, 32 Id. 72, note to *Janison* v.

Jamison, 31 Id. 541. Certificate of notary is only *prima facie* evidence of the facts therein set forth in California: *Fogarty v. Finlay*, 70 Id. 714.

DEED OF FEME COVERT IS VOID, if it does not appear from the certificate of her acknowledgment that she was examined separate and apart from her husband: *Jourdan v. Jourdan*, 11 Am. Dec. 724; *Healy v. Rowan*, 52 Id. 94, and note 96; *Jordan v. Covey*, Id. 516, and note 519; *Warren v. Brown*, 57 Id. 191; *Krens v. Peeler*, 67 Id. 286, and note; *Louden v. Blythe*, Id. 442, and note 445.

MORTGAGE OF MARRIED WOMAN'S LAND, what necessary to the validity of, and when will not be sustained: See *Louden v. Blythe*, 67 Am. Dec. 442; *Holles v. Francois*, 51 Id. 760, and note 768.

ACKNOWLEDGMENT ON PART OF WIFE on private examination, separate and apart from her husband, required by the statute, is an essential part of the execution of the deed, or mortgage, without which no estate passes, and the instrument is invalid, as far as the separate estate of the wife is concerned; and parol evidence is admissible to contradict the official certificate of acknowledgment, the notary certifying that the wife acknowledged the instrument on private examination: *Annan v. Folsom*, 6 Minn. 501; *Edgerton v. Jones*, 10 Id. 429, both citing the principal case.

MEIGHEN v. STRONG.

[6 MINNESOTA, 177.]

WHERE IN ACTION UNDER STATUTE authorizing any person in possession of real property, by himself or tenant, to commence action against any one claiming adverse interest or estate therein for the purpose of determining such interest, and possession is directly put in issue, it is not error for the court to refuse to dismiss the action, if the plaintiff has introduced enough evidence touching his possession to justify the court in leaving this question to the jury.

RECORD OF DEED EXECUTED IN PRESENCE OF ONE WITNESS only is inadmissible in evidence under a statute requiring that every conveyance of lands shall be executed in the presence of two witnesses. Such requirement is imperative, and must be complied with to give the instrument any validity as a conveyance.

WHERE THERE HAS BEEN ACTUAL CONVEYANCE OF LAND, defectively executed, the legislature may cure the defect, so far, at least, as to bind the parties thereto, or if the defect relates merely to the evidence by which the conveyance is to be established, the rule of evidence may be so changed as to enable that to be shown which, without such change, would have been insufficient; and this would be binding upon all who subsequently acquire title with knowledge of the former conveyance.

WHEN, AS IN MINNESOTA, STATUTE PRESCRIBES MANNER in which only a conveyance of real property by deed can be made, any attempt to convey without complying with the requisites of the statute must be treated as a mere nullity; and the legislature can not give it validity, so as to affect persons who may have subsequently acquired title to the property, without divesting them of rights which they had legally acquired.

JUDGMENT IS ERRONEOUS when predicated upon the finding of a jury sworn to try "the issues joined between the parties;" but instead of finding upon all the issues, they return a verdict, special in form and referring to but one issue.

THE opinion states the facts.

Norton and Mitchell, Wells, and Colburn, for the appellants.

Butler, for the respondent.

By Court, EMMETT, C. J. This action was brought under that provision of our statute which authorizes any person in possession of real property by himself or tenant to commence an action against any one claiming an adverse interest or estate therein, for the purpose of having such adverse estate or interest determined: Comp. Stats., p. 595, sec. 1. The evident design of the legislature in passing this act was to give to parties in possession of real property the same facilities for testing the merits of adverse claims of title that are always at hand for those who are excluded from the possession, but claim an estate therein adverse to that of the occupant. The latter may at any time, before they are barred by the statute of limitations, bring an action against the occupant to recover the possession of which they are deprived; while the occupant, being in the enjoyment of all his rights, has, without the aid of the statute, no right of action until he has in some manner been interfered with. He would therefore have to await the leisure of those claiming adversely, and they may never urge their claims until the evidences, by which the title of the occupant is established or their own repelled, may become lost or obscured. To avoid such a contingency, the statute authorizes the occupant to institute proceedings against any one claiming an adverse interest or estate by which the party so claiming is forced at once either to establish his claim or abandon it altogether. Such being the object and design of the law under consideration, the importance to the plaintiff of showing himself in possession of the premises is apparent; for on that depends his right to bring the action under the statute.

In the present case, the plaintiff made the necessary allegation as to his possession, and the defendants, by their answer, put his possession directly in issue. On the trial of this issue, after the plaintiff had submitted all his testimony touching his possession, the defendants moved the court to dismiss the action, on the ground that the plaintiff had failed to show himself in possession of the property in dispute. The court

refused to dismiss, and the refusal is here urged as ground for reversing the judgment.

The evidence on this point which the record discloses is not very satisfactory, but still, if the jury were to pass upon that issue, there was enough perhaps to justify the court in submitting the evidence to them, with proper instructions as to its legal effect.

There is, however, another point made in this case, wherein we think the decision was clearly erroneous. The court admitted in evidence, under the objection of the defendants, the record of a deed from Hayles to Brockett, which appears to have been executed in the presence of one witness only. In the case of *Parret v. Shaubhut*, 5 Minn. 323 [*ante*, p. 424], this court decided that the statute which requires that a conveyance of lands shall be executed in the presence of two witnesses, who shall subscribe their names thereto as such, is imperative, and must be complied with to give the instrument any validity as a conveyance. Every conveyance of lands must be in writing, under seal, signed by the grantor, and executed in the presence of two witnesses, who shall also sign the same as such. Each of these requirements is essential to the validity of the conveyance, and one cannot be dispensed with more than another. Had the contract of conveyance to Brockett been by parol, or without seal or signature, it would have been regarded as an attempt only to convey the lands; and no one, even with a full knowledge of such attempt, would, on that account alone, have hesitated to purchase from Hayles; and yet, by the statute, it is no more essential that the conveyance should be in writing, or signed or sealed by the grantor, than that it should be executed in the presence of, and attested by, two witnesses.

In this view of the law, it will be apparent that it is wholly immaterial whether the defendants, or either of them, knew of the attempted conveyance by Hayles to Brockett, at the times they respectively purchased the premises. At the time of the conveyance from Hayles to Meighen, Hayles had not yet conveyed away his title, and unless there were facts bearing upon the transaction other than the mere void conveyance to Brockett, Meighen had a right to disregard Brockett's deed, and take a conveyance to himself—just as he might have done had Hayles attempted to convey the land to Brockett by parol, or by an instrument without signature or seal.

The act of July 26, 1856, declaring all conveyances executed in the presence of one witness to be legal and valid (Com.

Stats. 403, 404), does not, in our opinion, aid the plaintiff. The rights of the defendants had accrued before this act was passed. Where there has been an actual conveyance of lands, but the conveyance is defectively executed, the legislature may cure the defect, so far at least as to bind the parties thereto; or if the defect relates merely to the evidence by which such a conveyance is to be established, the rule of evidence may be so changed as to enable it to be shown by evidence, which, without such change, would have been adjudged insufficient; and this would be binding, not only upon the parties, but all who subsequently acquire title with a knowledge of the former conveyance. In that case, the statute would operate, not upon the conveyance itself, but upon the evidence by which it is to be established, and could not be said to affect the title, for that had already passed, though the evidence of it was insufficient. But when, as in this state, the statute prescribes the manner in which only a conveyance of real property by deed can be made, any attempt to convey without complying with the requisites of the statute must be treated as a mere nullity; and the legislature could not give it validity, so as to affect persons who may have subsequently acquired title to the property, without divesting them of rights which they had legally acquired.

There are other questions arising upon this record which we cannot forbear alluding to, although they are not presented by counsel; nor are they necessary to the decision of this case. This is an action in which, by the terms of the statute, all the issues of fact must be tried by the court, unless by the order of the court, or the consent of the parties, they, or some specific fact involved therein, are submitted to a jury or referee: Com. Stats. 557, secs. 6, 7. It seems, however, to have been assumed in this case, that the issues must be tried by a jury, for the record shows no order of court for the submission, nor any consent of parties that a jury should try the issues. The jury were sworn to try "the issues joined between the parties," but instead of finding upon all the issues, or generally for the plaintiff, they return a verdict which is special in form, and refers to but one issue. It was recorded in the language following:

"We, the jury, find that at the time the deed was made by J. B. Hayles to Meighen, that Meighen had notice of a deed having been made by Hayles to Brockett."

This verdict falls far short of determining "the issues joined between the parties," and yet, as appears by the record, the

judgment for the plaintiff is predicated wholly upon this finding. The verdict is not sufficient to warrant the judgment, so long as the issue as to the plaintiff's possession remains undisposed of. For we might admit all that is found by the jury, and even that the land had been conveyed to Brockett by an instrument sufficient in every particular; and yet, if the plaintiff was not in possession, he could not maintain this action. The judgment is erroneous, therefore, in any aspect of the case. The issue as to the plaintiff's possession, having been made, should have been determined in favor of one party or the other. If it was submitted to the jury, they should have passed upon it, and if it was not so submitted, it should have been decided by the court.

The order of the judge refusing to set aside the verdict and grant a new trial is reversed, and a new trial awarded.

CERTIFIED COPY OF RECORD OF DEED not entitled to record because not proved or attested as provided by statute so as to admit of its registration, is inadmissible in evidence: *Rushin v. Shields*, 56 Am. Dec. 436, and note 441; *Oliver v. Persons*, 76 Id. 657. Everything essential to title must appear of record: *Benson v. Smith*, 66 Id. 285, and note 289; *Chamberlain v. Bell*, 68 Id. 260.

LEGISLATIVE POWER OVER REMEDIES: See *Oriental Bank v. Freeze*, 36 Am. Dec. 701; *Baughner v. Nelson*, 52 Id. 694; *Reapers' Bank v. Willard*, 76 Id. 755; *Von Baumbach v. Bade*, Id. 283, and notes to these cases.

LEGISLATURE HAS NO POWER to make void proceeding valid: *McDaniel v. Correll*, 68 Am. Dec. 587.

VERDICT MUST COMPREHEND WHOLE ISSUE or issues submitted to the jury: *Wood v. McGuire's Children*, 63 Am. Dec. 246.

IN ACTION UNDER MINNESOTA STATUTE by a party in possession to determine an adverse claim, interest, or estate in lands, the action must be brought by a party in actual possession: *Murphy v. Hinds*, 15 Minn. 183; *Hamilton v. Batla*, 8 Id. 405. The only matters within the purview of such act are claims of estates or interests in real property adverse to the occupant: *Bidwell v. Webb*, 10 Id. 62. And the object of the action is to force one claiming an adverse interest or lien to establish or abandon his claim: *Walton v. Perkins*, 28 Id. 415. For this remedy is given to parties who, because they are in possession, cannot sue in ejectment: *Starbuck v. Dunklee*, 12 Id. 161, all citing the principal case.

THE PRINCIPAL CASE IS DISTINGUISHED in *Morris v. Keil*, 20 Minn. 534, as being brought under and involving the construction of different statutes.

LAY v. SHAUBHUT.

[6 MINNESOTA, 273.]

EQUITY WILL RELIEVE FROM MISTAKE without prejudice to sales made under other judgments, where a sheriff, intending to sell property attached, advertises and sells land under an erroneous description, and not belonging to the judgment debtor, to the judgment creditor, who is also ignorant of the mistake, and supposed that he was purchasing, and intended to purchase, only the land attached.

THE opinion states the facts.

Wilkinson and Barney, for the appellants.

Waite and Burt, and Chatfield, for the respondents.

By Court, EMMETT, C. J. The general rule that an act done, or contract made, under a mistake, or ignorance of a material fact, is relievable in equity, is peculiarly applicable to this case.

The plaintiffs, having previously commenced an action for the recovery of money against George W. Lay, one of the defendants in this action, had attached, as security for the satisfaction of such judgment as they might recover therein, certain real estate belonging to said Lay, amongst which were ten lots in the town of Mankato. The lien thus acquired proved to be prior to the liens or interest acquired by any of the defendants in the present action. After the plaintiffs had recovered judgment against Lay, in the action in which said property had been attached, execution was issued thereon and delivered to the sheriff of Blue Earth county, who was the same who had attached the property at the instance of the plaintiffs. Upon the receipt of this writ, it became the duty of said sheriff to satisfy the judgment out of the property attached by him, if it were sufficient for that purpose: Comp. Stats. 552, sec. 156. He accordingly advertised for sale under said execution ten lots in the town of Mankato, as the property of said Lay, supposing at the time that he was advertising, and intending thereby to advertise, the same ten lots which he had previously attached. But in describing the same he committed an error in regard to the particular plat or survey by which eight of the lots were numbered, they being numbered in the return to the attachment according to Everett's survey, whereas he described them in the notice of sale as numbered according to the survey of Bruner. On the day appointed for the sale, the sheriff still being ignorant of any error in the description, and intending to sell the same lots which he had

attached, as before mentioned, sold, according to the erroneous description, all of the lots as one parcel to the plaintiffs, for a sum sufficient to satisfy their judgment, and costs, and returned the execution as "satisfied in full." At the time of the sale, the plaintiffs also were ignorant of any mistake in the description, and bid upon the lots, and purchased the same, supposing that they were purchasing, and intending only to purchase, the lots which had been attached at their instance to secure such judgment as they might recover against Lay. The ten lots attached belonged to Lay, but according to the description contained in the notice of sale he had no manner of title or claim to eight of the lots actually sold.

The error in the description appears not to have been discovered until after the plaintiff's judgment had been entered satisfied of record, and until after other but subsequent judgment creditors, relying upon the payment of plaintiffs' prior lien, had sold certain other real estate of said Lay to satisfy their claims. The plaintiffs then brought their action for relief, setting forth the mistake of fact under which they purchased, and alleging the insolvency of Lay.

The court found the facts substantially as above stated, and granted the relief prayed for, but without prejudice to sales made on other judgments, on the faith of the plaintiffs' judgment being satisfied.

We think that the plaintiffs were entitled to the relief granted. They purchased the property under a mistake of a fact which was material to their contract, and the main efficient cause of their purchase. They had the first lien upon the property attached, and ought not to be deprived of it without payment, unless it becomes necessary for the protection of parties having equal or superior equities. To restore the plaintiffs to their rights does not prejudice junior judgment creditors, for the liens of the latter were, from the first, subject to the plaintiffs' lien. They are not therefore considered merely in the light of creditors deprived by the judgment of the court below of any right to which they had entitled themselves—they are merely prevented taking advantage of a mistake for which perhaps the sheriff alone is responsible; for as it was the duty of the sheriff to satisfy the judgment out of the property attached, the plaintiffs might reasonably believe that he would not, in the first instance, attempt to sell any other. The decree simply restores the parties to the same condition

in which they were prior to the sale, at the same time protecting all who have acquired rights by purchases made on the faith of the plaintiffs' judgment being satisfied of record. This, it appears to us, protects all who have shown themselves entitled to protection; and as to the others, as they are in the same condition that they would have been in had no sale taken place, they can lose nothing, and ought not to expect that a court, in the exercise of its chancery powers, would inflict a loss upon the plaintiffs for their especial benefit.

Judgment affirmed.

WHERE REAL ESTATE HAS BEEN LEVIED upon and sold as property of judgment debtor, but to which he has no title, the purchaser, whether the judgment creditor or a stranger, may recover from such debtor the purchase-price of the real estate, which has been credited upon the judgment: *Rood & Co. v. Crosthwait*, 71 Am. Dec. 406, and note 409.

THE PRINCIPAL CASE IS APPROVED in *Shaubhut v. Hilton*, 7 Minn. 509. It is cited in *First Nat. Bank of Hastings v. Rogers*, 22 Id. 231, to the point that where the equities of third parties have not intervened, equity will set aside an execution sale, when the purchase is made in ignorance of the real facts as to the title to property assumed to be sold, and the purchaser has been guilty of no negligence in ascertaining such facts.

ARNOLD v. WAINWRIGHT.

[6 MINNESOTA, 858.]

INTEREST OF PARTNER IN PARTNERSHIP EFFECTS is a share in the surplus remaining of the partnership property after paying off the debts of the firm.

EACH PARTNER HAS LIEN UPON PARTNERSHIP PROPERTY, to the end that he may insist that it be first applied to the payment of the firm debts. This interest of the individual partner in the firm assets is assignable, and may be taken in execution.

IN EQUITY, LAND BELONGING TO PARTNERSHIP is treated as mere personality, and is governed by the rules applicable to that species of property.

WHETHER LAND IS TO BE DEEMED PART OF PARTNERSHIP STOCK depends upon the agreement of the partners, which agreement may be either express or implied.

LANDS MAY BE CONVERTED INTO PARTNERSHIP STOCK by parol agreement of the partners, or by such facts and circumstances attending its acquisition or use as will raise an implication that the partners so intended. The legal estate will be controlled by the terms of the conveyance, but equity will subject the lands to the same liabilities imposed upon the other partnership estate, and restrict the partners to the same extent in their disposition of them as obtains in regard to personality.

IF LAND IS ACQUIRED AS SUBSTRATUM OF PARTNERSHIP, or is brought in and used by it for partnership purposes, there will be a trust by opera-

tion of law for the partners as tenants in common, although a trust may not have been declared in writing, and the ownership may not be apparently in all the members of the firm, or if in all, may apparently be in them, not as partners, but as joint tenants.

EACH PARTNER IS ENTITLED TO REGARD entire partnership estate as held for his indemnity as against the joint debts, and as security for the ultimate balance which may be due him for his own share of the partnership effects.

RULE THAT EQUITY REGARDS LAND HELD BY PARTNERSHIP as personal estate prevails, notwithstanding the legal title may, by the death of the party holding it, have been cast by descent upon his heirs at law, or that the estate may have been conveyed to the partnership by such deed as would, under the statute, make them tenants in common; nor does it make any difference that the deed makes no reference upon its face to the grantees as partners.

LAND PURCHASED WITH PARTNERSHIP FUNDS, to be used and applied to partnership purposes, and treated by the partners as part of the partnership stock, will be treated in equity as held in trust for the partnership until the partnership account is settled and the firm debts are paid.

UNDER MINNESOTA STATUTE, TRUST ARISES in favor of a partnership when lands are conveyed to the individual members of the firm as tenants in common, or otherwise than as partners; nor does the recognition and enforcement of such trust conflict with the statute of frauds.

UNDER MINNESOTA STATUTE, IF CONVEYANCE OF LAND TO PARTNERS makes no reference to the land as partnership stock, but vests the title in several of the members as tenants in common, then the trust which arises between the partners cannot be enforced against a *bona fide* purchaser or mortgagee without notice, but will be enforced against a purchaser or mortgagee from one partner, or his representative, who has notice, actual or constructive, that the land is partnership property.

THE opinion states the facts.

Chatfield and Buell, for the appellants.

Bryant and Austin, for the respondents.

By Court, FLANDRAU, J. This court has on several occasions been called upon to decide questions involving the rights and interests of partners in the partnership effects, and we have always held that such interest is a share (limited by the articles of partnership) in the surplus remaining of the partnership property after paying off all the debts of the partnership: *Pease v. Rush*, 2 Minn. 107; *Moss v. Pettingill*, 3 Id. 216; *Schalck v. Harmon*, 6 Id. 265. Each partner has a lien upon the partnership property, to the end that he may insist upon its being first applied to the payment of the firm debts; or as it is sometimes expressed, the partnership property is held by the partners subject to a trust for the payment of the firm debts, and neither of the members can divert it into any other

channel. This interest of the individual partner in the assets of the firm is assignable, and may be taken in execution.

There is very little difficulty in adjusting the rights of partners, and the creditors of partners, in the partnership property, when once the fund and the liabilities are ascertained, as the law governing these relations is pretty well understood and settled. A much more troublesome question frequently arises as to what is and what is not properly partnership property, especially in regard to real estate not designated in the conveyances to the partners as belonging to the stock of the partnership.

In regard to all lands which are ascertained to be partnership property, the rule in equity is, that they shall be treated as mere personalty, and be governed by the rules and general doctrines applicable to that species of property: Story on Partnership, sec. 93. "The ground of this doctrine appears to be a special interference of equity in favor of commerce, whereby the trust is separated from the legal estate, and the latter being left to pass according to the nature of real property, the trust estate is made subject to the rules of partnership personal property, so far as concerns the interest of the partners in relation to one another, and those who are in privity with them: 1 Am. Lead. Cas. 336, note to *Coles v. Coles* and *Dyer v. Clark*.

Whether land is to be deemed part of the partnership stock depends upon the agreement of the partners, which agreement may be either express or implied. After a very careful examination of the authorities, and the statutes of this state concerning trusts and fraudulent conveyances, we are of the opinion that lands may be converted into partnership stock by parol agreement of the partners, or by such facts and circumstances attending its acquisition or use as will raise an implication that the partners so intended. The legal estate will be controlled by the terms of the conveyance, but equity will subject the lands to the same liabilities imposed upon the other partnership estate, and restrict the partners to the same extent in their disposition of them as obtains in regard to the personalty.

The elementary writers do not furnish a very satisfactory solution of the question as to what character of agreement between the partners will work a conversion of lands into partnership stock. They agree that it may be accomplished by agreement "express or implied," and we think it is the necessary result of their views, as expressed in their text and the

numerous cases cited by them, that the intention of the partners, to be ascertained from their acts or agreements, is to govern, and that no express agreement in writing is necessary: See Collyer on Partnership, 68-78; Story on Partnership, secs. 92, 93; 3 Kent's Com. 37, title, Of Stock in Land; 1 Madd. 93, 94; 1 Lomax's Digest of the Law of Real Property, 212, 213; Adams's Eq. 35. This latter author, in treating the subject of trusts, adopts the decision in the case of *Dale v. Hamilton*, 5 Hare, 369, 382, S. C., 26 Eng. Ch. 368, and says: "In accordance with the same principle, it is held that if land is acquired as the substratum of a partnership, or is brought into and used by the partnership for partnership purposes, there will be a trust by operation of law for the partnership as tenants in common, although a trust may not have been declared in writing, and the ownership may not be apparently in all the members of the firm, or if in all, may apparently be in them, not as partners, but as joint tenants."

In a very recent case in Maine, the whole subject was ably discussed, and it was held that the trust attached to lands owned by the partnership, without regard to the character of the deed by which the partners held: *Crocker v. Crocker*, 46 Me. 250. We make the following extract from the opinion of the court, from page 544 of the American Law Register:

"Each partner is entitled to regard the whole estate as held for his indemnity as against the joint debts, and as security for the ultimate balance which may be due to him for his own share of the partnership effects: 2 Story's Eq. Jur., sec. 1243; *Hoxie v. Carr*, 1 Sumn. 173; *Buchan v. Sumner*, 2 Barb. Ch. 198, 199 [47 Am. Dec. 305].

"In relation to real estate when it is part of the partnership effects, it is to be treated in equity to all intents and purposes as a part of the partnership funds; and whatsoever may be the form of the conveyance, it will be held subject to all the equitable rights and liens of the partners which would apply to it if it were personal estate; and this rule prevails, notwithstanding the legal title may, by the death of the particular party holding it, have been cast by descent upon his heirs at law: 1 Story's Eq. Jur., sec. 647, and cases there cited; *Dyer v. Clark*, 5 Met. 562 [39 Am. Dec. 697]. Such is the rule also, notwithstanding the estate may have been conveyed to the partners by such deed as under our revised statutes of 1841, chapter 91, section 13, and the revision of 1857, chapter 73, section 7, would at law make them tenants in common: *Burnside v. Mer*

rick, 4 Met. 537; *Howard v. Priest*, 5 Id. 582; *Fall River Whaling Co. v. Borden*, 10 Cash. 458, before cited. Nor does it make any difference that the deed makes no reference upon its face to the grantees as partners: *Tillinghast v. Chaplin*, 4 R. I. 173 [67 Am. Dec. 510]."

Where the land is purchased with partnership funds, to be used and applied to partnership purposes, and is treated by the partners as part of the partnership stock, it will be treated in equity as held in trust for the partnership until the partnership account is settled and the partnership debts are paid: *Howard v. Priest*, 5 Met. 582; 1 Am. Lead. Cas. 336, note.

It is contended that no trust in favor of a partnership can arise under our statute of uses and trusts, when the lands are conveyed to the individual members of the firm as tenants in common, or otherwise than as partners. A careful examination of this statute (Comp. Stats. 382-384) satisfies us that although the act was designed to and does do away with some trusts that would otherwise result, it was not the intention of the framers to cut off trusts of this nature. If the statute contains any prohibition of such a trust as we are considering, it must be found in section 5, which declares "that every disposition of lands . . . shall be directly to the person in whom the right of possession and profits shall be intended to be vested," etc. But this section is qualified by the succeeding one, which declares "that it shall not extend to trusts arising or resulting by implication of law," etc. And section 10 distinctly recognizes "implied or resulting trusts," by providing that such trusts shall not "be alleged or established to defeat or prejudice the title of a purchaser for a valuable consideration, and without notice of such trust." Nor do we think that the recognition and enforcement of such a trust conflicts in any manner with the statute of frauds. Section 6, page 457, of the compiled statutes, provides as follows:

"No estate or interest in lands other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing subscribed," etc. This section expressly excepts such trusts as the one under consideration, resulting by operation of law from the peculiar situation of the lands, and the relation of the grantees or owners. That the powers of the court of equity were not to be limited by this act, except where specially pro-

vided, appears more clearly from section 10, which provides that "nothing in this chapter contained shall be construed to abridge the power of courts of equity to compel the specific performance of agreements in cases of part performance of such agreements," meaning necessarily such agreements as would otherwise fall within its prohibitory clauses.

The remaining question is, whether the plaintiff shows that the lands in controversy were partnership property. It appears that the plaintiff and the defendants Alfred F. and John L. Howes, on the twenty-second of June, 1857, formed a partnership under the name of Howes & Wainwright, the object of which was the establishment of a forwarding, commission, warehousing, and storage business. Prior to this date, John L. Howes owned one half, or the southerly forty-four feet, of the land in dispute. At the formation of the copartnership, the plaintiff, at the request of John L. and Alfred F. Howes, purchased the other half, or the northerly forty-four feet of said land. It was then agreed between the partners, verbally, that the eighty-eight feet should be put in, and become part and parcel of the capital stock of the firm, to be used and employed for the sole benefit of the firm, and for carrying out the objects of the copartnership. The partners then, by a series of deeds, vested in each member of the firm one equal undivided third part of the whole eighty-eight feet. Thus the plaintiff conveyed to John L. Howes two thirds of the northerly forty-four feet, and John L. Howes conveyed to the plaintiff one third of the southerly forty-four feet, and to Alfred F. Howes two thirds of the whole eighty-eight feet. The two first deeds were executed on the twenty-second day of June, 1857, the day on which the copartnership was formed, and the deed to Alfred F. Howes was executed on the twenty-sixth day of the following August. The title, therefore, so far as was apparent from the conveyances, was held by the members of the firm as tenants in common.

In July, 1857, prior to the deed to Alfred F. Howes, the firm commenced the erection of a warehouse on the southerly forty-four feet of the land, for the purpose of carrying into effect the objects of the copartnership, reserving the northerly forty-four feet for the convenience of the partnership business. The building was completed in the spring of 1859, the plaintiff paying one third of the cost, and the other two members each engaging to do the same. Partnership debts to a considerable amount were contracted in the erection of the building. The

business of warehousing, forwarding, commission, and storage was, after the erection of the building, actually entered into by the firm, and conducted in the building until the dissolution of the partnership.

It is contended by the counsel for the defendants, that as the object of the partnership was the establishment of the business of forwarding, commission, warehousing, and storage, the partnership did not go into effect until the business was actually commenced, after the erection of the warehouse. This view we cannot adopt. It is at variance with and too narrow a construction to be placed upon the acts and agreements of the parties. The nature of the business contemplated by the partnership required that the principal part of the capital stock of the firm should consist of the warehouse, the land upon which it stood, and a convenient area about it. No step could be taken towards transacting either branch of the proposed business—commission, forwarding, warehousing, or storage—without a warehouse or store, which must have been either purchased, rented, or built. The partners adopted the latter. This step taken, and very little more capital stock was needed to carry on the business, save the labor and skill of the several partners. Were the acts alone of the parties, without their agreements, placed before us as our guide, we could hardly resist the conclusion that it was their intention to make a contribution of the land and building to the capital stock of the firm.

We have so far considered the question as between the partners themselves. We will now examine it in its bearings upon third parties. If the conveyances, as in the case at bar, make no reference to the land being partnership stock, but vest the title in the several members as tenants in common, then the trust which arises between the partners cannot be enforced against a *bona fide* purchaser or mortgagee without notice (Comp. Stats., p. 382, sec. 10), but will be enforced against the purchaser or mortgagee from one partner, or his representative, who has notice, actual or constructive, that the land is partnership property: 1 Lomax's Dig. 254, 255; 1 Am. Lead. Cas. 339, note to *Coles v. Coles* and *Dyer v. Clark*; *Edgar v. Donnally*, 2 Munf. 387; *Hoxie v. Carr*, 1 Sumn. 174, 192; *McDermot v. Laurence*, 7 Serg. & R. 438 [10 Am. Dec. 468]; *Ford v. Herron*, 4 Munf. 316; *Fink v. Branch*, 16 Conn. 261, 271; 3 Kent's Com. 39, 40.

In the case at bar, the defendants Arnold and Samuel R.

Howes are charged distinctly with actual knowledge that the lands were partnership property, and the consideration moving from them for their conveyances are assailed in a manner that would take from them the character of *bona fide* purchasers, even if they had not been notified. The consideration for the assignment of the mortgage to George E. Howes is also alleged never to have been paid, nor intended to have been paid, which places him in the same position with the defendants Arnold and Samuel R. Howes. The defendant Swift, being merely the assignee of an insolvent estate for the benefit of creditors, of course takes the land *cum onere*.

The defendants' counsel pointed out some slight inconsistencies between the allegations in the complaint and the reply, but we regard them as unimportant in the view we have taken of the case, except so far as they may reflect upon the credibility of the plaintiff's pleadings. The allegations of the complaint alone are sufficient to charge the land in the hands of the defendants with the trust in favor of the partners, therefore the issues of fact joined must be tried.

The order denying the motion for judgment in favor of the defendants on the pleadings is affirmed.

PARTNER'S INTEREST IN PARTNERSHIP GOODS is his share of the surplus after all demands against the firm are paid: *Sutcliffe v. Dohrman*, 51 Am. Dec. 450; *Dyer v. Clark*, 39 Id. 697; *Doner v. Stauffer*, 21 Id. 370, and note 374; *Morrison v. Blodgett*, 29 Id. 653.

EACH PARTNER HAS RIGHT to have partnership effects appropriated to the payment of firm debts: *Pearson v. Keedy*, 43 Am. Dec. 160, and note 164; *Allen v. Center Valley Co.*, 54 Id. 333. Further, as to lien of partner on assets of the firm, see notes to *Kirby v. Schoonmaker*, 49 Id. 164; *Miller v. Estill*, 67 Id. 311; see also the rulings in the latter case.

PARTNERSHIP REALTY IS TREATED in equity as personalty: *Roberts v. McCarty*, 68 Am. Dec. 604; *Andrews's Heirs v. Brown*, 56 Id. 252; *Lang's Heirs v. Waring*, 60 Id. 533, and citations in notes to these cases.

INTENTION OF PARTNERS to bring land into partnership, how must be manifested: *Ridgway's Appeal*, 53 Am. Dec. 586, and note 589.

COURT OF EQUITY LEAVES LEGAL TITLE of partnership realty undisturbed, except so far as is necessary to protect the equitable rights of the partners: *Buchan v. Sumner*, 47 Am. Dec. 305; *Lang's Heirs v. Waring*, 60 Id. 533.

LAND PURCHASED BY PARTNERSHIP, how held, whether as joint tenants or as tenants in common: See *Baca v. Ramos*, 29 Am. Dec. 463, and note; *Baird v. Baird's Heirs*, 31 Id. 399; *Buchan v. Sumner*, 47 Id. 305; *Dyer v. Clark*, 39 Id. 697; *Dillon v. Brown*, 71 Id. 700.

REAL ESTATE PURCHASED BY FIRM as partnership property is liable to the payment of partnership debts: *Divine v. Mitchum*, 41 Am. Dec. 241; *Dyer v. Clark*, 39 Id. 697; *Buchan v. Sumner*, 47 Id. 305; *Roberts v. McCarty*, 68 Id. 604; *Lang's Heirs v. Waring*, 60 Id. 533, and notes to these cases.

HEIR OF DECEASED PARTNER HOLDS LEGAL TITLE to real property belonging to the firm in trust for the surviving partner for the payment of the firm debts: *Andrews's Heirs v. Brown*, 56 Am. Dec. 252, and note 255.

PARTNER HAS LIEN ON PARTNERSHIP REALTY for a balance found due him upon a settlement at the dissolution of the firm: *Roberts v. McCarty*, 68 Am. Dec. 604, and note 606.

PARTNER HAS LIEN UPON PARTNERSHIP ASSETS, and a right to insist that the firm property shall be appropriated so that the debts shall be paid, the losses fairly apportioned, and the obligations to himself discharged: *Palmer v. Tyler*, 15 Minn. 115, citing the principal case.

REALTY CONVEYED TO PARTNERS as tenants in common is partnership property in equity when purchased with firm funds for the use of the partnership: *Tillinghast v. Champlin*, 67 Am. Dec. 510, and note 541.

FOLSOM v. CARLI.

[6 MINNESOTA, 420.]

ASSUMPSIT FOR USE AND OCCUPATION cannot be supported, where the possession is adverse, and the relation of landlord and tenant has never existed between the parties; but plaintiff must declare in ejectment or trespass.

IN ACTION ON NOTE, COUNTER-CLAIM for use and occupation cannot be the subject of set-off, where the possession is adverse, and the relation of landlord and tenant has never subsisted between the parties. This under the Minnesota statute.

WHERE CONTRACT IS BASIS OF TRANSACTION, and a breach of it may amount to a trespass, or entitle the injured party to an action for negligence, fraud, or otherwise, in form *ex delicto*, such party is not deprived of his right to plead a counter-claim as set-off against the action. The wrongdoer is not allowed to deprive the injured party of the advantage of the contract, by having tortiously violated it.

THE opinion states the facts.

Burt, for the appellant.

Thompson, for the respondent.

By Court, FLANDRAU, J. Carli brings suit against Folsom on a promissory note for one hundred and twenty-nine dollars and fifty-two cents, dated January 22, 1859, payable in seven months after date, with interest at one per cent per month. The answer of Folsom sets forth that on the thirtieth day of November, 1857, one Lee recovered a judgment against two McKusicks and the defendant Folsom, for four hundred and forty-five dollars and thirty-five cents. That prior to the recovery of the judgment, at the time thereof, and up to the twenty-fifth day of August, 1858, Noah McKusick, one of the defendants in the judgment, owned a certain piece of land in fee

That execution was issued on the judgment February 12, 1859, and the land of Noah McKusick sold thereon on the eighteenth day of May, 1859. That the defendant purchased the land at the sale for three hundred and thirty-eight dollars and eighty-one cents. That no redemption had been made, and no interest paid, and that the plaintiff has been in the occupation of the premises since the sale by the permission and sufferance of the defendant, and the defendant claims the value of the use of the premises as a counter-claim to the note.

The reply alleges that the plaintiff, on the twenty-eighth day of August, 1858, purchased the premises from Noah McKusick and wife in fee, and that he has been in the occupation of them ever since, by virtue of his ownership, and not otherwise.

Upon this state of facts, the plaintiff had a verdict, the court holding and directing the jury that the defendant could not recover his counter-claim for use and occupation if the plaintiff had been in possession under his purchase from Noah McKusick.

The question here is not whether the claim is recoverable at all, but whether it can be put in as a counter-claim. The plaintiff held and enjoyed the premises under a title from the real owner, free from any connection with the defendant or the judgment under which he purchased. His possession was adverse to the defendant, and there was no privity or contract between them upon which the relation of landlord and tenant could arise; therefore any claim that the defendant has against the plaintiff for the use and occupation, or more properly speaking for the value of the possession, of the land after he became entitled to it, does not arise out of any contract between them, either express or implied, but upon his wrongful and tortious holding. It is quite clear that the defendant could not have maintained an action of *assumpsit* for such use and occupation, before the forms of actions were abolished, as that action could only be maintained, as its name imported, upon a contract or undertaking, express or implied. His remedy would have been ejectment or trespass: 1 Chit. Pl. 107; *Smith v. Stewart*, 6 Johns. 46 [5 Am. Dec. 186]; *Bancroft v. Wardwell*, 13 Id. 489 [7 Am. Dec. 396]; *Featherstonhaugh v. Bradshaw*, 1 Wend. 134; *Vandenheuvel v. Storrs*, 3 Conn. 203; *Little v. Pearson*, 7 Pick. 301; *Jones v. Tipton*, 2 Dana, 295.

Let us now see whether the claim of the defendant would have been the subject of a set-off before the forms of action

were abolished. At common law, independently of statutes, a set-off of cross-demands, unconnected with each other, was not allowed. A defendant could claim, by way of deduction, all just allowances or demands accruing to him, or payments made by him, in respect of the same transaction or account which formed the ground of the action, but could go no further. This was remedied by the 2 Geo. II., c. 22, sec. 13, where mutual debts were allowed to be set off against each other: 1 Chit. Pl. 569-571. The demand must have been in the nature of a debt, and a set-off was excluded in all actions arising *ex delicto*: Id. 571, 572. The general features of the English statutes of set-off are embodied in our own: Comp. Stats. 503, sec. 44. This demand could not have been the subject of a set-off against the plaintiff's claim prior to 1851, the date of the abolition of the forms of actions. It must not be overlooked, that although actions formerly had different names and forms, yet these names and forms were not mere empty words, but arose out of the nature of the subject-matter of the action, and entailed upon it substantial privileges and disabilities, materially affecting the rights of parties.

Now, what is the effect of our statute upon the subject-matter of actions, by providing that "the distinction between the forms of actions at law heretofore existing are abolished, and there shall be in this territory hereafter but one form of action at law, to be called a civil action," etc.? Comp. Stats. 532, sec. 1. It is fully explained by subsequent portions of the same act, which point out what shall be stated in the complaint, answer, and reply, which are the only pleadings now allowed to make up the issues; and it is quite evident from the chapter on answers that no change whatever was designed to be made concerning the nature of the demand that might be pleaded to bar, or reduce a recovery by the plaintiff from the law as it existed before the passage of the act. The familiar terms of recoupment and set-off are discarded in the new law, and the word "counter-claim" substituted; but what that counter-claim comprehends is explained. Section 71, page 541, provides that "the counter-claim mentioned in the last section must be an existing one in favor of the defendant and against the plaintiff, between whom a separate judgment might be had in the action, and arising out of the following causes of action:

1. "A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the

plaintiff's claim, or connected with the subject of the action." Now, this is what would have been previously allowed by way of recoupment, and it neither enlarges nor limits that doctrine, but simply declares it as it previously existed.

2. "In an action arising on obligation, any other cause of action arising also on obligation, and existing at the commencement of the suit." This is merely an enunciation of the law of set-off, and does not enlarge it in any respect. If the word that is employed by the statute, "obligation," should be confined within its strict technical sense, it would greatly limit the law of set-off, as it more properly means a "bond:" Co. Lit. 172 a; 2 Bla. Com. 340. But we think the legislature intended it to receive a more liberal construction, and to apply to all matters arising *ex contractu*.

It is our opinion that any claim that would not have been the proper subject of set-off before the adoption of the code does not fall within the provisions of subdivision 2 of section 71, page 541, of the compiled statutes, above quoted.

While the form of actions were in existence, a party had what was called the right of election of actions. This right, in the hands of a skillful pleader, could be used to great advantage. There were many cases in which a plaintiff could declare in trespass, trover, or case according to the facts, or he might elect to waive the tort and declare in *assumpsit*. So in general, a plaintiff could elect to declare either in *assumpsit* or debt. One of the most usual reasons in practice for adopting a form of action *ex delicto*, instead of declaring in *assumpsit*, was to cut out an apprehended offset, which could be interposed to the latter, but not to the former. Many other advantages could be gained by this right of election, which it is unnecessary to enumerate here. The subject is fully treated in 1 Chit. Pl. 207-212, title, Of Election of Actions. But it is believed that with the abolition of the forms of action, and the substitute adopted by our statute, together with the new system of pleading, many, if not all these, advantages are necessarily lost to the pleader. He must now state his facts; he must state them truly; and he must prove them as alleged, to succeed. The defendant, in his answer here, attempted to state his claim for the use and occupation of the premises in the manner he would have done had he been framing a declaration therefor in *assumpsit*. He alleges that the occupation of the plaintiff was by his "sufferance and permission," thereby establishing the relation of landlord and tenant

between them, upon the truth of which alone could the claim be set off. This is put in issue by the reply, and the real facts are therein alleged, the jury finding the reply to be true.

There are many cases where the basis of the transaction between parties is a contract, and the breach of the contract may amount to a trespass, or entitle the injured party to an action for negligence or fraud, or otherwise, in the nature of an action *ex delicto*. We do not mean to hold that in such cases the party is necessarily deprived of his right to set off such a claim, or that a claim arising on contract may not be offset against such a cause of action. No such result follows from our view of the code. In all such cases, there is a contract between the parties in fact, and the wrong-doer is not allowed to deprive the injured party of the advantage of it by having tortiously violated it.

In the case at bar, there never was any contract between the parties in fact, or by implication of law. They were total strangers to each other, claiming title to the land from different and adverse sources. In relation to such cases, Mr. Chitty says: "*Assumpsit* for use and occupation cannot be supported where the possession is adverse, and the relation of landlord and tenant has never subsisted between the parties, but the plaintiff must declare in ejectment or trespass:" 1 Chit. Pl. 107, and cases cited.

We think the judge was correct in his rulings, and the judgment should be affirmed.

ASSUMPSIT FOR USE AND OCCUPATION, when will lie: See *Hoffman v. Dement*, 46 Am. Dec. 628, and note 630; *Fitzgerald v. Beebe*, Id. 285, and note 289, citing the principal case; *De Young v. Buchanan*, 32 Id. 156; *Eastman v. Howard*, 50 Id. 611; *Dwight v. Cutler*, 64 Id. 105.

ASSUMPSIT FOR USE AND OCCUPATION will not lie where defendant's holding is adverse: *Boston v. Binney*, 22 Am. Dec. 353, and note 358; *Eastman v. Howard*, 50 Id. 611.

SET-OFF NECESSARILY FLOWS FROM CONTRACT, and injury from independent tort cannot be set off against a demand founded on contract: *Price v. Lewis*, 55 Am. Dec. 536. Where defendant claims that the delivery of the property, the subject-matter of dispute, is the same relied on by plaintiff, but by the terms of the agreement under which it was made it was not a sale, but a contract of agency, and sets forth the terms of it, and alleges certain breaches by the plaintiffs of certain conditions obligatory upon them, whereby he has suffered damages, which are set forth, the subject-matter of the answer, as far as the character of it is concerned, is a proper ground of counter-claim: *Steele v. Etheridge*, 15 Minn. 509, citing the principal case.

WYKOFF v. IRVINE, STONE, & McCORMACK.

[6 MINNESOTA, 496.]

TRANSACTION BETWEEN PARTIES CREATES RELATION of principal and broker, or agent, where bankers receive money to be loaned out, and agree with the depositor to account to him for the principal and interest, less their charges. In such case, the bankers are only limited in their conduct to the observance of good faith, and the exercise of proper care and circumspection. If they in good faith loan the money to a party solvent at the time, they are protected, notwithstanding the party to whom the money is loaned subsequently becomes insolvent.

RELATION OF PARTIES TO EACH OTHER as fixed by written agreement cannot be changed by parol evidence.

THE opinion states the facts.

Sanborn and Lund, for the plaintiff in error.

Cooper, for the defendants in error.

By Court, FLANDRAU, J. The defendants were bankers. The plaintiff left with them the sum of four hundred and twenty-five dollars, to be loaned out by them, and took from them the following paper:

“ST. PAUL, M. T., July 24, 1857.

“Received of J. B. Wykoff, esq., four hundred and twenty-five dollars in American gold, to be loaned out. We to account to him for the principal and interest, less our charges, etc., not to exceed two and one half per cent per annum.

“IRVINE, STONE, & McCORMACK.”

This transaction created between the parties the relation of principal and broker, or agent, to loan money. It confides to the defendants the entire control of the loans that were to be made with the money, leaving it to their judgment and discretion to select the borrowers, determine the security to be taken, fix the times of the loans, and regulate all other matters concerning them. They were only limited in their conduct to the observance of good faith, and the exercise of proper care and circumspection. They loaned the money out to some one, and collected it in again, with interest, which had swelled the amount to the sum of five hundred and seventy-five dollars. They subsequently reloaned it with the accumulated interest, and took as security a note. The maker of the note subsequently became insolvent, and the note worthless. There is no charge of either bad faith or mismanagement in the making of this second loan; only that the note, at the time the defendants were called upon for an accounting, was worthless.

If the defendants acted in good faith, and loaned the money to a party solvent at the time of the loan, they are protected: *Loitard v. Graves*, 3 Cai. 226; *McKinstry v. Pearsall*, 3 Johns. 319; *Van Alen v. Vanderpool*, 6 Johns. 69 [5 Am. Dec. 192]; *Robertson v. Livingston*, 5 Cow. 473; *Corlies v. Cumming*, 6 Id. 181.

The complaint, however, alleges that the money was to be loaned for a period of six months from the time of its receipt by the defendants, and that the defendants, without the knowledge or consent of the plaintiff, reloaned it after the expiration of the six months, and also that the defendants were to be liable and responsible to the plaintiff for the amount and interest. These allegations are in direct conflict with the terms of the paper signed by the defendants at the time they received the money, and could not be given in evidence to contradict it. The relation of the parties to each other was fixed by the writing, and could not be changed by parol. They were agents vested with full discretionary powers to loan the money, and some bad faith, or gross negligence amounting to fraud, must be charged, to make them personally liable.

The demurrer was well sustained.

Judgment affirmed.

PAROL EVIDENCE IS NOT ADMISSIBLE to contradict or vary written agreement: *Pribble v. Kent*, 71 Am. Dec. 327; *Rockmore v. Davenport*, 65 Id. 132; *Cannon v. Folsom*, 63 Id. 474, and citations in notes to these cases.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

DENNY v. LYON.

[88 PENNSYLVANIA STATE, 98.]

WHERE OWNER OF STOCK EXECUTES AND DELIVERS POWER OF ATTORNEY authorizing the person named therein as attorney to transfer the stock to a person the place for whose name is left blank, with the understanding that it is to be pledged as collateral security to a particular creditor of the person for whose benefit the power of attorney was executed, and the name of such creditor is afterwards inserted in the blank, the authority of the attorney is exhausted by thus inserting the name of the creditor whose debt was to be secured by the transfer; and when that debt is paid, the owner of the stock is entitled to its return, notwithstanding the fact that the attorney may have transferred it as security for other debts, by erasing the name first inserted and inserting another in the blank originally left therein.

WHERE STOCK IS HELD AS COLLATERAL SECURITY FOR PAYMENT OF PROMISSORY NOTE which is indorsed by a third person, and the holder, without the consent of the original owner of the stock, releases the indorser for the purpose of making him a witness in a suit in equity by such owner for the recovery of the stock, the stock will be thereby released, and cannot be held for the purpose of enforcing payment of the note.

BILL in equity. The court below, on hearing, held that the stock mentioned in the opinion was specifically pledged for the debt to Preston & Wagner, and could not be held by Mrs. Aspinwall, and that even if she had at one time a right to hold the stock, her release to Noble operated to release it; and directed Denny and the bank to make and permit a retransfer of the stock to Mrs. Lyon, and to pay to her the dividends drawn by Denny or held by the bank, with costs. The respondents appealed. The other facts are stated in the opinion.

H. Brady, Wilkins, and Charles Shaler, for the appellant.

Hamilton and Acheson, for the appellees.

By Court, WOODWARD, J. This bill was filed to compel Dr. Denny and the Exchange Bank to retransfer to the plaintiff twenty-eight shares of the capital stock of the said bank, which the plaintiff alleges she loaned to her son, Martin S. Lyon, for the purpose of pledging them, under a power of attorney executed by her in blank, as collateral security for a debt which he owed to Preston & Wagner. That debt having been paid, Mrs. Lyon reclaims her stock.

The respondents deny that the stock was loaned to Martin to be pledged for the debt of Preston & Wagner, or any other specific debt, and allege that it was loaned to him for the purpose of raising money generally to assist him in carrying on his business, and that after his debt to Preston & Wagner had been paid, he obtained a new loan on the credit of this stock from Nancy Harding through Dr. Denny, and that Annie R. Aspinwall having purchased the loan and all its securities of Mrs. Harding, the stock is now held in trust for her until the debt is paid.

There is no doubt that Martin S. Lyon made this second pledge of the stock for the purposes alleged in the answer, but there is no evidence that he did it with the knowledge or consent of his mother. The question, therefore, becomes very material whether she, in the first instance, placed this stock in his hands to be hypothecated to Preston & Wagner specifically, or to be used generally for obtaining money in the market as his necessities might require. Her son, Thomas Lyon, who was the subscribing witness to the power of attorney, swears that "the certificate of stock and power of attorney were delivered to M. S. Lyon for the purpose of using said stock as collateral security for the payment of a certain note held by Preston & Wagner against the owners of the steamboat W. H. Denny, and for no other purpose." The witness explains that of that boat his brother Martin was part owner; that Preston & Wagner, who had furnished the engine, required security for their debt; that the debt was put into the form of a note drawn by Martin S. Lyon, and indorsed by William Noble, and that the mother's stock was to be transferred as collateral security for the note. To the same effect is the testimony of Martin himself. And what corroborates these witnesses with considerable force is the fact that Dr. Denny filled up the

blank in the power of attorney with the names of Preston & Wagner. It may be, as is alleged, that he did not know when the power of attorney was first delivered to him that the purpose of it was to secure Preston & Wagner; but he must have understood this purpose before the transaction was consummated—else why did he insert their names? As executed by Mrs. Lyon, the power authorized Dr. Denny, as her attorney in fact, to transfer her stock to anybody; but as filled up by him, it was a special power authorizing him to transfer it to Preston & Wagner.

Such proof goes very far to sustain the allegation of the bill, that the complainant parted with her stock only for the purpose of securing Preston & Wagner, and that Denny understood this purpose.

And yet we have to look at the palpable fact that a mother gave her son in business a letter of attorney, directed to Dr. Denny, authorizing him to transfer her stock to any name that might be inserted; that the son first pledged it to Preston & Wagner, and then caused the attorney in fact to borrow more money on it, and to pledge it to himself as agent of the lady creditors above named. What if the original purpose was to secure Preston & Wagner—was not this giving a son an opportunity to obtain money on false pretenses? How could she know the power of attorney would be used only for the benefit of Preston & Wagner, or for them at all? If she meant it only for them, why did she not say so? May a lady put her stock, with a blank power of attorney, into market, and when she finds it transferred *bona fide* to secure a creditor who advanced money on the faith of it, come into equity and have the transfer canceled, on the ground that that was not the creditor whom she meant her stock should protect?

That must be regarded as very poor ground for equitable relief. In most cases it would be unfit to bottom a decree upon.

But this case is distinguished by one important circumstance. Mr. Murray, the cashier of the bank, swears that the name of the transferee is usually not inserted in the power of attorney, and that it is more convenient not to have it inserted. We know that this is the commercial usage. It was probably originated by the banks. If not, they have countenanced it, and thus brought people to practice it. And yet it is a vicious usage, which no considerations of convenience are sufficient to justify. *Malus usus obolendus est.* A power of attorney

signed, generally sealed, and duly delivered—what is it but a finished legal instrument? Who may alter that paper writing to the prejudice of another, without incurring liability to the charge of forgery? If commercial usage permit the attorney to insert the names of Preston & Wagner and then erase them, then insert the name of William Noble and next erase it, and then insert his own name as agent, what other legal instrument may not commercial usage tamper with in like manner? How striking an illustration of the badness of this usage we have in this case is seen when we consider that Mrs. Lyon's title to her bank stock is made to depend on what may happen to have been inserted, without her knowledge or consent, in a legal instrument wherein she was instructed to leave a blank.

Issuing her power in blank implies, say the defendants, her intention to pledge her stock to any creditor who should loan money to her son. Filling up the blank with the name of Preston & Wagner implies, she argues, that the defendants knew she had issued it only for the benefit of that particular firm. Erasing their names and inserting his own as agent of other creditors, says Dr. Denny, makes the transfer under it legal and valid. No, she rejoins, you exhausted your power when you inserted Preston & Wagner. And out of this forensic game of shuttlecock and battledoor we are expected to educe the equities of parties that shall determine the title to the stock.

Well, if it must be done, we will say, without intending a precedent, that Mrs. Lyon, having proved her allegation that she transferred the stock only to secure Preston & Wagner, is entitled to a return of it, seeing that their debt has been fully paid. If it be said that issuing the power in blank was an authority to insert any name, it is a sufficient answer that the name actually inserted was in accordance with the truth, and exhausted the authority.

We feel the more satisfaction with this conclusion, because we apprehend the release of Noble in order to make him a witness discharged the suretyship of Mrs. Lyon. If the defendants hold her stock as collateral security for the note of Martin S. Lyon, indorsed by Noble, and may enforce a transfer of the stock in payment of the debt, it is too plain for debate that she would be entitled to the note and the security of Noble as indorser. Yet the defendants have released him without her consent. A creditor who receives a collateral security from a third party is bound, if he avails himself of the collateral, to

preserve the original debt, for in equity the surety will be entitled to subrogation to it; and to release an indorser is so to impair the debt as to discharge the surety.

The decree below is affirmed.

POWER OF ATTORNEY, CONSTRUCTION OF: See *Billings v. Morrow*, 68 Am. Dec. 235, note 237, where other cases are collected.

THE PRINCIPAL CASE IS CITED in *Sitgreaves v. Bank*, 49 Pa. St. 365; and in *Building Association v. Sendmeyer*, 50 Id. 74, to the point that blank powers of attorney for the transfer of stock are customary; and in *Pratt v. Taunton Copper Co.*, 123 Mass. 112, to the point that the purchaser of the stock of a corporation, claiming under a transfer, which he knew or was bound to know, to be forged or fraudulent, has no right against the corporation.

FRAZIER v. PENNSYLVANIA RAILROAD CO.

[38 PENNSYLVANIA STATE, 104.]

CHARACTER FOR CARE, SKILL, AND TRUTH MUST BE PROVED BY EVIDENCE OF GENERAL REPUTATION, and cannot be established by proof of special acts.

WHERE ONE OF SEVERAL WORKMEN EMPLOYED IN SAME GENERAL SERVICE IS INJURED through the carelessness of another, the employer is not responsible.

RAILROAD COMPANY WHICH EMPLOYS CONDUCTOR KNOWN BY IT TO BE UNFIT for the business is chargeable with the consequences of such conductor's carelessness.

WHERE BRAKEMAN ON RAILROAD KNOWS HIS CONDUCTOR TO BE HABITUALLY CARELESS, and chooses to continue in service with him, and does not inform the company of his known acts of carelessness and refuse to serve with him, he cannot recover against the company for injuries suffered from further carelessness, even though the company also knows it.

OFFICER OF RAILROAD COMPANY HAVING CHARGE OF DEPARTMENT OF ITS BUSINESS IN WHICH INJURY OCCURS is the person who is expected to use ordinary care in the employment of proper conductors and other servants. His carelessness in that respect is the carelessness of the company, and his knowledge is its knowledge. It is, therefore, error to exclude evidence that such officer did not know that the person through whose improper conduct the alleged injury occurred was a careless conductor.

ACTION on the case, brought against the Pennsylvania Railroad Company by William Frazier, who was a brakesman employed by the defendant, to recover damages for personal injuries received by him in the course of his employment, by reason of a collision of trains caused by the negligence of one of the defendant's conductors. On the trial, the plaintiff, among other things, offered to prove by Shaeffer, the con-

ductor, that he had had several collisions on the road before, for which he was fined by the company, and that the agents of the company knew this; that the former collisions were caused by his carelessness; that they were known to the company, and were so treated by them. To this evidence, the defendant objected on the ground that previous special acts of negligence are not matters for the jury as to general character. But the court overruled the objection and admitted the evidence. On the part of the defendant, the deposition of Thomas A. Scott, the superintendent of the road, was offered in evidence, and the following portion of it relating to the conductor was rejected, as stated in the opinion: "I always considered him a safe, steady, and reliable man—a man, in my judgment, fully competent to perform all the duties pertaining to the management of freight trains as a conductor. I considered him a skillful conductor, and should not have hesitated, as superintendent of the road, to trust him with the management of freight trains. I considered him one of our safest and best men. I considered him perfectly trustworthy. So far as I know, his moral character was unexceptionable." There was a verdict and judgment for the plaintiff, and the defendant sued out this writ of error. Other facts appear from the opinion.

William A. Stokes, and J. C. Clarke, for the plaintiff in error.

H. D. Foster and H. P. Laird, for the defendant in error.

By Court, LOWRIE, C. J. The fundamental averment here is, that it was because of the carelessness of the conductor that the brakeman was injured, and in order to show that the company was responsible for this, it is averred that they were in fault in knowingly or negligently employing a careless conductor. The first count avers the duty of the company to have a careful and skillful conductor, and that this one was not so, and they knew it. The third, fourth, and fifth counts aver that the company might by proper care have known the conductor's character for care and skill, and that the plaintiff did not know it.

The question of character thus became an important one, and we are constrained to say that it was tried on improper evidence. Character for care, skill, and truth of witnesses, parties, or others must all alike be proved by evidence of general reputation, and not of special acts. The reasons for this have been so often given that we need not repeat them: 1 *Greenl. Ev.*, secs. 461-469; *Elliot v. Boyles*, 31 Pa. St. 67.

Character grows out of special acts, but is not proved by them. Indeed, special acts do very often indicate frailties or vices that are altogether contrary to the character actually established. And sometimes the very frailties that may be proved against a man may have been regarded by him in so serious a light as to have produced great improvement of character. Besides this, ordinary care implies occasional acts of carelessness, for all men are fallible in this respect, and the law demands only the ordinary.

In the case of *Ryan v. Cumberland Valley R. R. Co.*, 23 Pa. St. 384, we decided that where several persons are employed as workmen in the same general service, and one of them is injured through the carelessness of another, the employer is not responsible. Many cases were there cited in support of this principle, and many more might be added now: *Winterbottom v. Wright*, 10 Mee. & W. 109; *Brown v. Mallett*, 5 Com. B. 599, 616; *Skipp v. Eastern C. R. R.*, 9 Exch. 223; *Wiggett v. Fox*, 11 Id. 832; *Seymour v. Maddox*, 16 Q. B. 826; *King v. W. R. R. Co.*, 9 Cush. 112; *Gillshannon v. Stony Brook Railroad*, 10 Id. 228; *Couch v. Steel*, 3 El. & Bl. 402; *Bartonshill C. Co. v. Reid*, 3 Macq. 266; *Bartonshill C. Co. v. McGuire*, Id. 300; *Griffiths v. Gidlow*, 3 Hurlst. & N. 648; *Smith's Master and Servant*, Eng. ed. 1860, 133, 146; *Carle v. Bangor & P. C. R. R.*, 43 Me. 269; *Noyes v. Smith*, 28 Vt. 59; *Russell v. Hudson R. R. R. Co.*, 17 N. Y. 134; *Sherman v. Rochester & S. R. R. Co.*, Id. 153; *Whaalan v. Mad R. & L. E. R. R.*, 8 Ohio St. 249. We need not reconsider this question in its general aspect.

This rule was not disregarded on the trial, but if the company employ a conductor known by them to be unfit for the business, this new fact changes the question to be solved, and the court below charged that in such a case the company are chargeable with the consequences of the carelessness of the conductor. This instruction seems to us correct, and is supported by many decisions cited by the plaintiff's counsel, to which may be added *Mad River & L. E. R. R. Co. v. Barber*, 5 Ohio St. 541 [67 Am. Dec. 312].

But if the plaintiff knew that his conductor was habitually careless, and chose to continue in service with him, and did not inform the company of his known acts of carelessness and refuse to serve with him, he can have no claim against the company for injuries suffered from further carelessness, even if the company did also know: *Perry v. Marsh*, 25 Ala. 659;

McMillan v. Saratoga & W. R. R. Co., 20 Barb. 449; *Wright v. New York Central R. R. Co.*, 28 Id. 80; *Keegan v. Western R. R. Corp.*, 8 N. Y. 175 [59 Am. Dec. 476]; *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541 [67 Am. Dec. 312]; *Ricardo v. Maidenhead L. B. of H.*, 2 Hurlst. & N. 258, 768; *Skipp v. Eastern C. R'y Co.*, 9 Exch. 223; *Smith's Master and Servant*, 147, 150. The court below was in error in refusing to give this instruction to the jury.

It is not the company, but their officer having charge of this department of their business, that is expected to use ordinary care in the employment of proper conductors and other servants. His carelessness in this respect is theirs, and his knowledge is theirs: *Wright v. New York Central R. R. Co.*, 28 Barb. 80. It was therefore quite relevant and important to show that Thomas A. Scott, the superintendent, did not know that the conductor was a careless officer; supposing that the employment and oversight of conductors was part of the functions of the superintendent, which does not appear in the evidence, but seems to have been assumed. Standing for the company in this respect, his knowledge becomes one of the very issues in the cause, and the court was in error in rejecting the evidence.

These views seem to us to cover all the points that stand in need of correction by us.

Judgment reversed, and a new trial awarded.

LIABILITY OF MASTER FOR NEGLIGENCE OF FELLOW-SERVANT: See *Cooper v. Mullins*, 76 Am. Dec. 638, note 642; *Washburn v. Nashville etc. R. R. Co.*, 75 Id. 784, note 789; *Ohio etc. R. R. Co. v. Tindall*, 74 Id. 259, note 263, where other cases are collected. An employer is not liable for the negligence of a fellow-servant engaged in the same general business, unless he has neglected to use ordinary care in the selection of the negligent employee: *Caldwell v. Brown*, 53 Pa. St. 457, citing the principal case.

LIABILITY OF CORPORATIONS FOR ACTS OF THEIR OFFICERS: See *Hopkins v. Atlantic & St. L. R. R.*, 72 Am. Dec. 287, note 295, where other cases are collected. It is the officer of a company having charge of its business who, for all practical purposes, must be regarded as the corporation itself: *Arden Oil Co. v. Gilson*, 63 Pa. St. 150, citing the principal case.

THE AUTHORITY OF THE PRINCIPAL CASE IS DENIED in *Pittsburgh etc. R'y Co. v. Ruby*, 38 Ind. 314, on the point that proof of general reputation only is admissible in evidence to prove character for care, skill, and truth. In speaking of the principal case, Buskirk, J., delivering the opinion of the court, said: "This case stands alone, unsustained and unsupported, so far as we have been able to discover by any elementary work or decision. Nor can the decision be sustained in reason or on principle."

BANK OF DELAWARE COUNTY v. BROOMHALL.

[28 PENNSYLVANIA STATE, 125.]

BANK IS RESPONSIBLE FOR MISTAKING DATE OF NOTE RECEIVED FOR COLLECTION, when, owing to such mistake, the note was presented for payment before the proper time, and the indorser discharged.

ACTION on the case to recover damages for negligence in protesting before maturity a note which had been left with the bank for collection. There was a verdict and judgment for the plaintiff, and the defendant sued out a writ of error. The other facts are stated in the opinion.

Charles D. Manly, for the defendant in error.

By Court, LOWRIE, C. J. Certainly, when the bank accepted this note for collection, it became its duty to use reasonable care and skill in attending to it; yet herein it is chargeable with a remarkable blunder in treating the date the fifteenth of December as if it were the fifth. There can be no doubt that the fifteenth is there, for anybody can see it who looks, and the court could commit no error in saying that much. But the first figure was not so strongly marked as the other, and therefore the bank's officers interpreted it out rather than overlooked it, and thus made a mistake, and had the note presented for payment ten days too soon, and not at the proper time, and thus discharged the indorser. This was clear carelessness; for if there was any doubt about the date, the bank ought to have refused the collection of it, or to have got the holder to state what was the true date, or to have presented it on both days. To guess a meaning contrary to the expression is not careful. These views answer the first, second, and third assignments of error. The other is entitled to no special answer, because it contains nothing in itself, and because by reference it contains four points instead of one. But it is answered in what we have said.

Judgment affirmed.

LIABILITY OF BANK AS AGENT FOR COLLECTION: See *Baldwin v. Bank of Louisiana*, 45 Am. Dec. 72, note 76, where other cases are collected; *West Branch Bank v. Fulmer*, Id. 651; *Commercial and R. Bank v. Hamer*, 40 Id. 80.

HEARN v. KIEHL.

[33 PENNSYLVANIA STATE, 147.]

PLEA OF ACCORD AND SATISFACTION MUST ALLEGE, NOT ONLY CLEAR ACCORD, but that it was executed, and that the matter agreed upon was accepted in satisfaction; mere readiness to perform the accord, or a tender of performance, or even a part performance and readiness to perform the rest, will not be sufficient.

MERE TENDER TO CREDITOR'S COUNSEL OF SMALLER SUM than is due, a little sooner than the whole debt is due, without acceptance by either the creditor or his counsel, is no satisfaction.

ACTION on a promissory note. The court below entered judgment in favor of the plaintiff for want of a sufficient affidavit. The other facts appear from the opinion.

A. V. Parsons, for the plaintiff in error.

C. Guillou, for the defendant in error.

By Court, **WOODWARD, J.** Accord and satisfaction is a good plea by a debtor to the action of his creditor, but the legal notion of accord is a new agreement on a new consideration to discharge the debtor. And it is not enough that there be a clear agreement or accord, and a sufficient consideration, but the accord must be executed. The plea must allege that the matter was accepted in satisfaction. Mere readiness to perform the accord, or a tender of performance, or even a part performance and readiness to perform the rest, will not do. Such is the law between debtor and creditor.

The exception to these rules is where a number of creditors agree to accept of a common debtor a composition amounting to less than their entire demand. Such agreements are binding, the consideration for the contract of each creditor being found in the agreement of the other creditors: See the authorities collected in note to 1 Smith's Lead. Cas. 443-446; and in *Spruneberger v. Dentler*, 4 Watts, 126, and *Rising v. Patterson*, 5 Whart. 316.

The only consideration discernible in the agreement alleged in the affidavit of defense in this case is time. The sum stipulated to be paid in satisfaction of the debt was to be paid a little sooner than the whole debt would fall due, and that was the consideration for the plaintiff's promise. There was no other. Granting the sufficiency of this consideration, there was no execution of the accord. There was not even a tender to the plaintiff, but only to his counsel. There was no accept-

ance by either the plaintiff or his counsel. There was, therefore, no satisfaction, and so no defense, set forth in the affidavit. Judgment affirmed.

ACCORD AND SATISFACTION, WHAT CONSTITUTES: See *Rose v. Hall*, 63 Am. Dec. 402; *Leavitt v. Morrow*, 67 Id. 334; *Jones v. Perkins*, 64 Id. 136, note 138, where this subject is considered at some length. Actual satisfaction is absolutely essential to sustain the plea of accord and satisfaction: *Kerr v. O'Connor*, 63 Pa. St. 347, citing the principal case. To constitute accord and satisfaction, that which is received by the creditor must be accepted by him in satisfaction: *Frick v. Algeier*, 87 Ind. 256, also citing the principal case.

HILL v. NEWMAN.

[28 PENNSYLVANIA STATE, 151.]

TRANSFER HAS LIEN FOR HAULING LUMBER USED IN ERECTION OF BUILDING, under the mechanic's lien law of Pennsylvania, and it is error to strike such lien off the record.

ERROR to the common pleas of Delaware county. The plaintiff in error filed a mechanic's lien on the building on the defendant's lot, appending thereto his bill, which was for hauling lumber for said building. The court below struck the lien off the record.

William Darlington, for the plaintiff in error.

E. Darlington, for the defendant in error.

By Court, LOWRIE, C. J. The law is, that every building may be subjected to a lien for the payment of all debts contracted for work done and materials furnished for or about its erection; and this may very fairly be taken to include the work of hauling the materials to the place of building. We think we should have to unduly strain the language in order to exclude it. It is work about the erection of the house, and is of course charged for by the material-man, when he has the lumber, stone, brick, sand, or lime delivered by his own carters. The hauling away of the clay dug out of the cellar and foundation is always considered proper work for him; and we know not why the carter may not be a proper man to claim it, if he did the work at the request of the owner or the contractor, and not as a mere hireling under the contractor or under a subcontractor. We think, therefore, that this lien ought not to have been struck off.

The order striking off the lien is reversed, and the lien restored, and the record remitted.

MECHANIC'S LIEN, WHO ENTITLED TO: See *East Tennessee Iron Mfg. Co. v. Dymun*, 65 Am. Dec. 56, note 57, where other cases are collected.

STROUSE'S EXECUTOR v. BECKER.

[38 PENNSYLVANIA STATE, 190.]

JUDGMENT DEBTOR FORFEITS RIGHT TO BENEFIT OF EXEMPTION LAW by falsely denying the ownership of his property, thereby hindering and delaying the sheriff in the collection of the debt, although the falsehood was uttered for the purpose of gaining time for the payment of the debt. The sheriff being the creditor's legal agent, a false representation that hinders the sheriff hinders the creditor.

DEBTOR MUST CLAIM EXEMPTION AGAINST EVERY EXECUTION CREDITOR, and if he do not, there is nothing to prevent one execution creditor from levying on goods that have been appraised and set apart under the process of another creditor.

ATTACHMENT EXECUTION IS EXECUTION PROCESS, and exemption may be claimed against a creditor proceeding by such process as effectually as against a creditor who comes with an execution in the ordinary form.

ATTACHMENT execution issued against Becker at the suit of Strouse, under which the Lycoming Mutual Insurance Company were summoned as garnishees. The garnishees admitted an indebtedness of one hundred and thirty-seven dollars. The defendant thereupon filed a special plea, averring that the money in the hands of the garnishees arose from an allowance made to him for loss and injury to household furniture by fire, and that the money due by the company was exempt from attachment under the exemption law. It appeared that an execution had been sued out by Roseberry, another creditor, against Becker, under which his household furniture had been levied on, the benefit of the exemption law claimed, and the property set apart to him appraised at two hundred and fourteen dollars and twenty-five cents. After this levy, and before claiming the benefit of the exemption law, he effected insurance on his household furniture for four hundred dollars, stating in his application that it was of the value of one thousand dollars. The furniture was afterwards injured or destroyed by fire, whereupon Becker applied to the company for damages, making an affidavit of ownership and the amount of the loss. When the levy above mentioned was made, Becker told the officer that the property was not his, but be-

longed to his wife. Under the charge of the court, there was a verdict and judgment for the defendant, and the plaintiff sued out a writ of error. The instructions of the judge contained in the first assignment of error, and to which reference is made in the opinion, are in the following words: "The deputy sheriff proves that when he called upon him, the defendant, with the *fieri facias* at the suit of Mr. Roseberry, he said the property was not his, but belonged to his wife. Was this a falsehood for the purpose of putting off the sheriff and gaining time for the payment of the execution, or was the false assertion made with the intent to hinder, delay, and defraud the creditor? If the former, it would not; if the latter, it would and should deprive him of the claim he sets up here." Other facts appear from the opinion.

John W. Roseberry and F. W. and J. Hughes, for the plaintiff in error.

Lewis Bartholomew and John Bannan, for the defendant in error.

By Court, WOODWARD, J. The rule of decision which denies the benefit of the exemption law to a dishonest debtor who shuffles and conceals his property, denies his ownership, and falsely alleges title in his wife, or other relative or friend, with a view of eluding the vigilance of the officer who has an execution to levy, is founded in a sound morality, and according to *Huey's Appeal*, 29 Pa. St. 219, and other cases, is agreeable, also, to the spirit and intention of the exemption law. It was an enactment for the honest poor, not for the roguish.

We cannot, therefore, concur with the learned judge in that part of his instructions which is contained in the first assignment of error. If the defendant's falsehood in regard to the ownership of the property in his possession was for the purpose of putting off the sheriff and gaining time for the payment of the execution, it was just as fatal to his rights under the exemption law as if it was made with intent to delay, hinder, and defraud the creditor. We cannot, indeed, see the ground for the court's distinction in this regard; for to put off the sheriff and gain time on the execution was, in our apprehension, to delay and hinder the creditor. The sheriff was the creditor's legal agent, and a false representation that hindered the sheriff hindered the creditor.

When an officer comes with an execution, it is the duty of

the debtor, as a good citizen, if he cannot pay the debt, to facilitate the making a levy. He should exhibit his property honestly, and claim only the exemption which the law allows him. It is a hard thing, doubtless, to be strictly honest in such an emergency, but it is best after all, even for the debtor himself. If his property be taken, his self-respect and conscious integrity are left, and he has gained a moral discipline which will go far towards repairing his fortunes. But if he equivocate and dissemble—denies the ownership of that which he cannot hide, and embarrasses the officer of the law in the execution of legal duties, he forfeits not only his self-respect, but his hold upon the exemption provided for honest debtors. And it is reasonable that he should; for what right has he to expose the officer to the peril of a suit for levying on the goods of a pretended owner, or, on the other hand, of incurring liabilities to the plaintiff for neglect of duty? If to escape from the dilemma in which the sheriff or constable finds himself placed, he obtains indemnity from the plaintiff, this is an inconvenience and a delay such as a debtor has no right to cause, and then turn around and show, by his admission of title and claim of exemption that it was needless and vexatious. In a word, the law would have all men honest and sincere. To debtors who are so, it leaves three hundred dollars' worth of property; to those who are not, it offers no reward.

Whilst we are clearly of opinion that the judge mistook the law, saying that a falsehood which put off the sheriff would not deprive the debtor of his statutory claim, we are not quite certain from the evidence that the sheriff was really hindered, or, in the language of the learned judge, "put off." Indemnity was spoken of, but we do not see from the evidence sent up that it was obtained, or that the sheriff was delayed. If the falsehood was merely casual, and was not used at a time and in a manner to delay, hinder, or embarrass the officer, indefensible as it was, too much account would be made of it by grounding upon it a denial of the statutory exemption. It is only a lie with circumstances, that works a forfeiture. If the officer is in no degree hindered or delayed by it, no legal consequences attach to it.

The next point is decisive of the cause. The court was asked by the plaintiff to say that the money due by the garnishee might be attached, and that it was not exempt from attachment by the provisions of the exemption law. The court refused to give such instruction.

Had the attachment been laid by Roseberry, the creditor under whose execution the appraisement was held, the refusal to give the instruction prayed for might perhaps have been justified. But Strouse was the attaching creditor, and how could the exemption that was claimed against Roseberry avail the defendant as against Strouse? The rule is, that an appraisement is available only against the execution creditor or creditors who have levied or are about to levy. The exemption is not given against creditors in general, nor against judgment creditors, but only against "levy and sale on execution, or by distress for rent." Hence the debtor must claim it against every execution creditor. If he do not, there is nothing to prevent one execution creditor from levying on goods that have been appraised and set apart under the process of another creditor.

Attachment execution is execution process, and the exemption may be claimed against a creditor proceeding by such process, as effectually as against a creditor who comes with execution in the ordinary form. The time and manner of making the claim must be adapted to the nature of the process, but if no claim there is no exemption. And here there was no claim as against Strouse's execution, and therefore no exemption. The point was not well put, for it may not have suggested this view of the case to the mind of the judge at all. We are inclined to believe, indeed, that it did not. Yet it ought to have been affirmed, not for the reasons urged by counsel in its support, but because the debtor had claimed no exemption from Strouse's execution process. If on the next trial he can prove a claim, he may stand a chance of success.

The judgment is reversed, and a *venire facias de novo* awarded.

DEBTOR WHO DENIES HIS OWNERSHIP OF HIS PROPERTY forfeits his right to its exemption: *Shaw's Appeal*, 49 Pa. St. 206; *Emerson v. Smith*, 51 Id. 93; *Rose v. Sharpless*, 33 Gratt. 156, all citing the principal case.

ATTACHMENT EXECUTION IS EXECUTION PROCESS, and exemption may be claimed against a creditor who proceeds by that process as effectually as against a creditor who comes with an execution in the ordinary form: *Reiser v. Elliott*, 11 Phila. 344, citing the principal case.

THE PRINCIPAL CASE WAS AFFIRMED in 44 Pa. St. 206.

DUBOIS'S APPEAL.

[33 PENNSYLVANIA STATE, 281.]

ATTORNEY HAS LIEN FOR HIS FEES UPON MONEY OR PAPERS OF HIS CLIENT while they are in his hands; but possession is as indispensable to his lien as it is to the lien of an ordinary bailee or factor.

ATTORNEY CANNOT MAINTAIN CLAIM UPON FUND IN COURT AGAINST MORTGAGEE or a judgment creditor, even though such mortgagee or creditor be his own client. An attorney has no title to the judgment which he secures, or to the mortgage which he is instrumental in obtaining, and not being an owner, he cannot claim as a distributee.

MORTGAGE GIVEN TO THREE PARTNERS TO SECURE PAYMENT OF DEBT DUE FIRM may be transferred by an assignment of such debt, executed by one of the partners in the name of the firm. And the fact that a seal is appended to the name of the firm does not invalidate the assignment.

APPEAL by John L. Dubois, for himself, and as administrator of Samuel M. Dubois, deceased. The facts appear from the opinion.

C. E. and J. L. Dubois, in support of claim for professional services.

George Lear, for the appellee.

By Court, **STRONG, J.** An attorney, in behalf of a firm consisting of three partners, brought suit and recovered a judgment against their debtor. An execution was then issued, and levied upon the debtor's interest in a tract of land belonging to his wife. The husband and wife then joined in executing a mortgage upon her land to the three members of the firm, to secure the payment of the judgment which had been recovered against the husband. Subsequently, the land was sold under judicial process, at the suit of another mortgagee of the husband and wife, and the proceeds of the sale were brought into court for distribution. They suffice to satisfy the mortgage given to the members of the firm, and the present controversy is between rival claimants to the fund applicable to its payment. It is insisted, on behalf of the attorney, that he is entitled to take out a reasonable compensation for the professional services rendered by him in obtaining the judgment for the firm, and for issuing execution thereon. In other words, it is claimed that he has a lien on the fund in court, though it was not brought there through his agency, and though it was never in his hands.

In a certain sense, an attorney has been said to have a lien for his fees, upon the money or papers of his client, while they are in his hands. He may deduct from money collected by

him a just compensation for collecting it, and need only pay over the balance. This, however, is a right to defalcate, rather than lien. So he may retain papers intrusted to him, until he has been paid for services rendered in regard to them. But possession is indispensable to his lien as much as it is to the lien of an ordinary factor or bailee. It has never been determined that he can maintain a claim upon a fund in court, against a mortgagee or a judgment creditor, even though such mortgagee or creditor be his own client. In distributing money in court, the common pleas is guided by the liens of record. True, if there be a question respecting the ownership of a record lien, the court may decide it; but lien is not ownership. The attorney has no title to the judgment which he secures, or to the mortgage which he is instrumental in obtaining. Not being an owner, he cannot claim as a distributee. We concur, therefore, in opinion with the learned president of the common pleas, that the attorney, as such, was not entitled to share in the distribution made in this case. The next question is, whether the court erred in not decreeing to the appellant, as administrator of an assignee of two of the copartners of the firm of Fetherolf, Montgomery, & Co., two thirds of the sum secured by the mortgage, instead of awarding the whole to Isaac Barton, a prior assignee under an assignment made by the third partner in the name of the firm, and made to discharge a partnership debt. The facts are, that the firm was largely indebted to Isaac Barton, after the judgment against Hellerman had been recovered, and after the mortgage of Hellerman and wife had been given to secure it. On the seventh of September, 1857, Montgomery, one of the partners, by an instrument signed Fetherolf, Montgomery, & Co., and sealed, assigned to Barton "all debts, dues, claims, and demands whatsoever" due to the firm, authorizing the assignee to collect them, and apply the sums collected to the payment of the debt due from the firm to him. The assignment also stipulated that if any surplus remained after payment of the said debt, it should be paid to the firm. Sixteen months afterwards, on the sixth of January, 1859, the other two partners assigned their interest in the mortgage to Daniel Fetherolf, under whom the appellant claims. The contest is between the assignees under these two assignments. The appellant, who claims under the second, insists that the prior transfer to Isaac Barton was inoperative to pass the mortgage, or at all events, more than the interest of Montgomery therein, because it was only an assignment of the debts due to the firm, and he con-

tends that the mortgage was the property of the partners as tenants in common, and not the property of the firm. This allegation is founded upon an entire misapprehension of the character of the mortgage, and of the purpose for which it was made. It was indeed given to the three partners, and not the firm in its distinctive name. But it was given to secure the payment of a judgment belonging to the firm. That judgment was the substance of which the mortgage was only the shadow. Payment of the debt to the firm would have extinguished the mortgage of course. An assignment of all debts due to the firm undeniably carried the judgment to the assignee, and with it, by necessary consequence, all securities for its payment. This is none the less true because the securities may have stood in other names than those of the plaintiffs in the judgments. In whatever name the mortgage stood, it was but collateral to the judgment, and dependent upon it for continued existence.

Again: it is insisted that the assignment to Isaac Barton was invalid, because Montgomery appended a seal to the name of the firm. The objection does not call in question the power of one partner to assign partnership credits in payment of debts due from the firm, but he denies that he can do it in the mode here adopted by a sealed instrument. It is doubtless a general principle of the common law that a partner cannot bind his copartners by seal, but this is to be taken with some qualification. The partnership relation will not authorize one partner to execute an instrument under seal, whereby a new and original obligation is imposed upon the firm. He cannot charge the firm by seal, but he may discharge it, and it seems now to be generally settled that when a seal is not essential to the nature of a contract and will not change its legal effect, the addition of a seal will not vitiate it. The cases upon this subject are collected in 1 Am. Lead. Cas. 297, 298, and we shall not go over them. The rule protects a partnership rather against executory than executed contracts. The assignment of a chose in action, in payment of a debt, does not charge but discharge. It is not an executory contract creating an obligation. Its legal effect is not changed by adding a seal to it. Montgomery's assignment to Barton was not, therefore, vitiated by the form in which it was made. In *Everit v. Strong*, 5 Hill, 163, the precise question here made was ruled, and it was held that an assignment of a chose in action by one partner under seal was a good assignment. We are of the same opinion.

Finally, it is insisted that the assignment to Barton was void because it was not recorded within thirty days, in accordance with the requirement of the act of the twenty-fourth of March, 1818. That act is wholly inapplicable to this case, for two reasons: 1. Because no trust in favor of creditors was created by the instrument; and 2. Because no creditor of the firm contests it. The strife is between two assignees of the mortgage.

Upon the whole, we discover nothing to invalidate the claim of the appellee to the money in court, and we affirm the decree of the court below.

The decree of distribution is affirmed.

ATTORNEY'S LIEN: See *Dodd v. Broth*, 66 Am. Dec. 541, note 543, where other cases are collected. Possession is indispensable to an attorney's lien: *Humphrey v. Browning*, 46 Ill. 485; *Nichols v. Pool*, 89 Id. 494, both citing the principal case.

ASSIGNMENT OF DEBT SECURED BY MORTGAGE DRAWS AFTER IT MORTGAGE: *Perkins v. Sterne*, 76 Am. Dec. 72, note 76, where other cases are collected.

LOGUE v. COMMONWEALTH.

[33 PENNSYLVANIA STATE, 265.]

KILLING ASSAILANT MAY BE EXCUSABLE, although it turn out afterwards that there was no actual danger, if it is done under a reasonable apprehension of loss of life or great bodily harm, and the danger appears so imminent at the moment of the assault as to present no alternative of escaping its consequences but by resistance.

ERROR to the oyer and terminer of Clarion county. The defendant was jointly indicted with one Ira Davis for the murder of Jared Lewis, but was tried separately. He had robbed a house and absconded. Lewis, who had a warrant for his arrest, armed himself with a loaded pistol, and with two companions went in search of the prisoner. Lewis, in attempting to make the arrest, suddenly sprang upon Logue, presented his pistol at his breast, and ordered him to stop. Logue thereupon drew his revolver and shot Lewis, who died shortly afterwards. The jury found the defendant guilty of murder in the first degree. Other facts appear from the opinion.

John D. Mahon and B. J. Reid, for the plaintiff in error.

William L. Corbett, and Campbell and Lamberton, for the commonwealth.

By Court, THOMPSON, J. We need not recapitulate the facts of this case, and will proceed at once to the consideration of what seems to be the debatable grounds in it, and they are to be found in the views of the learned judge on the subject of self-defense. But little else needs to be noticed; the charge and ruling of the court on every other point of the case being, so far as we can discover, just and accurate.

The sixth and tenth assignments of error present the questions now for consideration. The sixth is as follows, and the tenth is the same in substance: "The court erred in charging as follows [which we suppose to be the qualifications referred to in answer to the fifth, sixth, and seventh points]: 'The prisoner's counsel contended that the homicide might be justifiable or excusable, if Logue, the prisoner, had reasonable cause to apprehend danger to his life, and if it appeared imminent. I cannot so instruct you, unless there was actual danger to his life, and not occasioned by resistance.'"

Divesting ourselves of impressions derived from certain facts in the case, and viewing the prisoner in the light of one lawfully passing along the highway in the night-time (for we may not judge of facts which might change this aspect of the prisoner's case), was the instruction right?

It is only in this light that we, as a court of error, can deal with the instructions. We cannot determine their accuracy by a recurrence to matters of fact, which might defeat a hypothesis. We must not be guided in our determination of the question whether the law was rightfully administered, because we may believe that the prisoner was a felon escaping from the commission of a flagetious crime at the time of the homicide, with a determination to resist all who should attempt to arrest him. These were considerations for the jury, under the evidence, and if proved, would undoubtedly change the prisoner's chance of escape under the law of self-defense. It is only on the ground of entire blamelessness that he might invoke the law to the extent of justifying or excusing him in taking life, and then by showing that the assault was of such a character as to induce a reasonable apprehension that he was in danger of losing his own life, or suffering some enormous bodily harm, and so the court should have charged. The learned judge thought that the apprehension of imminent peril would not excuse. "The danger must be actual."

Here, then, was a wide difference between the extent of the ground claimed as covered by the law of self-defense and

that laid down by the court, namely: The difference between a reasonable apprehension of the danger of loss of life or limb arising from circumstances appearing to indicate such a design on the part of the assailant, but which may in fact have been unreal; and that announced by the court, that nothing will excuse a homicide in self-defense but actual danger. It was of this last position that Parker, J., said in the celebrated trial of Selfridge in Boston, in 1805, that such "a rule would lay too heavy a burden on poor humanity." In treating of excusable homicide, Wharton, in his valuable work on criminal law, in section 1021, says: "Where the assault may have been so fierce as not to allow him [the slayer] to yield a step without manifest danger of his life, or enormous bodily harm, and then in his defense, if there be no other way of saving his own life, he may kill his assailant instantly." This is the principle of all the books, in case of actual danger.

After treating of many aspects of self-defense under such circumstances, in section 1026, same book, another rule is given: "If the apprehension of an immediate and actual danger to life be sincere, though unreal, it is in like manner a defense;" and it is added, "Although this proposition, in its present shape, has been accepted with great reluctance and in very recent times by the court, and should be always applied with extreme caution, it has at all periods been practically recognized." And *Levett's Case*, Cro. Car. 538, is cited. That was a case where an alarm having been given by a servant that there were robbers in the house, the defendant, with a drawn sword in his hand, slew a servant girl of the neighborhood, who, being lawfully in the house at the time, concealed herself in the buttery to avoid being seen by him. This was held to be excusable homicide by misadventure. So, in the case of Sir William Hawkesworth, who was killed by his gamekeeper, mistaking him for a deer-stealer. These are old cases.

The principle of reasonable apprehension was laid down by the learned judge in *Selfridge's Case*, to be found in Russell on Crimes, p. 485. So has it been held in the state of New York, in *People v. Shorter*, 4 Barb. 460, and affirmed in the court of errors and appeals, 2 N. Y. 197 [51 Am. Dec. 286], opinion by Bronson, J. There the principle is thus stated: "When one who is without fault is attacked by another, in such a manner or under such circumstances as to furnish reasonable ground for apprehending a design to take away his

life, or do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, I think he may safely act upon appearances and kill the assailant, if that be necessary to avoid the apprehended danger; and the killing will be justifiable, although it may afterwards turn out that the appearances were false, and there was in fact neither a design to do him serious injury, nor danger that it would be done." True, there is a statute on the subject in New York, but it has been held in many cases to be only declaratory of the common law. The same principle may be found decided in *State v. Scott*, 4 Ired. L. 409 [42 Am. Dec. 148]. So, in Ohio, in *Stewart v. State*, 1 Ohio St. 71. So, in *Oliver v. State*, 17 Ala. 587. The case of *Commonwealth v. Seibert*, Luzerne Co., 1852, cited with approbation in Wharton on Homicide, 227, at length, is to the same effect.

We might multiply authorities to sustain the accuracy of the point, but it is not necessary. I take the rule to be settled, that the killing of one who is an assailant must be under a reasonable apprehension of loss of life or great bodily harm, and the danger must appear so imminent at the moment of the assault as to present no alternative of escaping its consequences but by resistance. Then the killing may be excusable, even if it turn out afterwards that there was no actual danger.

The law of self-defense is a law of necessity, and that necessity must be real, or bear all the semblance of reality, and appear to admit of no other alternative, before taking life will be justifiable or excusable. Whenever it is set up, the case will always call for a most careful and searching scrutiny, to be sure that it rests, where alone it can rest, on the ground of real or apparently real necessity. As the books fully define the duty of all acting under this necessity, we will not encumber this opinion by restating it. Suffice it to say here, that as the law of necessity governs this right, it follows that there must be no blame on the part of him who seeks immunity under it. If the slayer be in the wrong, the killing will not be excusable, much less justifiable. The offense then will, according as the facts may be, come under the definitions of murder, murder in the second degree, or manslaughter.

In the case in hand, the prisoner claimed the benefit of this view of the law; of course, upon the hypothesis that there was nothing wrong on his part, and that the assault upon him was

of such a character and under such circumstances as to produce that reasonable apprehension that there was a design to take his life or do him some great bodily harm, as justified him in firing on the supposed assailants and killing one of them. Now, as there were facts showing a sudden assault by men concealed in the bush until the moment it took place, one of them presenting a pistol towards the prisoner, and the other with stones in his hands, as if about to be used, there was room to raise the point and call for the instructions claimed by the prisoner's counsel. The court could not say, nor can we, that the testimony in the case by the witnesses deprived the prisoner of his right to an answer upon this hypothesis; for the facts were alone for the jury, and they might believe or disbelieve them, as they might be credible or otherwise. Under such circumstances, we think that the judge erred in his answer in defining the prisoner's rights under his assumed position. It having turned out that the deceased was an officer, whose object was not to kill or injure, but merely to arrest, it would have been impossible to have proved actual danger, although the appearances might, to an innocent man, have presented a case of imminent peril, which, under the law as already stated, might have excused the killing.

It is true, a refusal to charge as requested, and charging as complained of, did not necessarily imply guilt of any particular or defined grade, on failure of making the proof which the court thought to be necessary to excuse. Still, it took away a bare possibility of escape, on the ground that the prisoner might be an entirely innocent man, notwithstanding the evidence in the case. Hence we think it better, notwithstanding the circumstances which the proof presents, to send this case back for a new trial to secure to the prisoner all the rights the law allows him, and to vindicate the law itself. The act of 1856 requires the correction of errors in law in cases of this nature, and it does so to prevent possible, as well as certain, injury to prisoners, and in this spirit we are bound to execute it.

We see no error whatever in the charge of the court in any other part of the case. It is obvious that if the law of self-defense will not, under the facts, excuse the prisoner, then his case will be murder in the first or second degree, or manslaughter, as the proof may justify; and on these points the charge was proper, clear, and sufficient, in view of the testimony given.

It was suggested on the argument here, that even if there

was error in the particulars discussed, it did the prisoner no harm, as the jury found him to be guilty of a willful, deliberate, and premeditated murder, and therefore the law of self-defense could have no application to his case. This suggestion is more plausible than sound. It would be very unsafe to prove the accuracy of all the steps in a trial by the result of the verdict. Who can tell what the result might be in any given case where there is error in some of its parts? The result might be accurate, but it would probably be accidental. The law does not conclude parties and rights upon such uncertain grounds. Its utmost effort is accuracy, as far as it may be attained through fallible agencies, and then its mission is complete, and its conclusions irrevocable.

And now, to wit, February 25, 1861, the judgment of the court of oyer and terminer, in this case, is reversed, and a new trial is awarded, and the record is remitted, together with a copy of this opinion.

HOMICIDE, WHEN JUSTIFIABLE ON GROUND OF SELF-DEFENSE: See *Wesley v. State*, 75 Am. Dec. 62, note 69, where other cases are collected. Although there was no actual danger, if the necessity for the killing in self-defense is clearly apparent, and is such as would convince a reasonable man that it actually existed, it is sufficient: *Wall v. State*, 51 Ind. 471, citing the principal case.

MICHENER v. CAVENDER.

[88 PENNSYLVANIA STATE, 334.]

IF ALDERMAN FALSELY OR BY MISTAKE CERTIFIES TO SEPARATE EXAMINATION and acknowledgment of a married woman, in a mortgage of her separate estate, although she never signed the instrument nor appeared before him, the mortgagee will be affected by the fraud, although he was not present at the acknowledgment nor informed of what took place. He cannot, in such a case, be presumed to be a *bona fide* purchaser; nor is it necessary to prove that he had notice of the fraud or mistake.

SCIRE FACIAS *sur* mortgage by Thomas S. Cavender against George W. Michener and Eveline E. Michener, his wife. The property covered by the mortgage was the separate property of the wife. A special plea was filed, alleging that she had not acknowledged the mortgage as required by the statute. The other facts appear from the opinion.

J. G. Michener and F. Carroll Brewster, for the plaintiff in error.

Hopper, for the defendant in error.

By Court, WOODWARD, J. Our recording acts having prescribed the form of acknowledgment necessary to be observed by married women in order to make a valid conveyance or mortgage of their interest in real estate, this court has held the official certificate of acknowledgment conclusive of every fact appearing on the face of the certificate, and has excluded parol evidence of what passed at the time of the acknowledgment, except in cases of fraud and duress. But in cases of fraud and imposition, or of duress, parol evidence has been freely admitted to overthrow the certificate, as in *Schrader v. Decker*, 9 Pa. St. 14 [49 Am. Dec. 538]; and *Loudon v. Blythe*, 16 Id. 532 [55 Am. Dec. 527]; S. C., 27 Id. 25 [67 Am. Dec. 442]. And where fraud and duress have been practiced in obtaining the acknowledgment, knowledge of it is to be brought home to the grantee, or of such circumstances as would lead him to inquiry upon the point.

Such is the doctrine of the cases in our books, and on the strength of it the learned judge ruled that the gross blunder, if not fraud of the alderman, in certifying to the separate examination and acknowledgment of a wife who had not signed the mortgage or appeared before him, could not affect Cavender, the mortgagee, because he was not present when the mortgage was acknowledged, and was never informed of what passed, and that he was to be presumed a *bona fide* purchaser.

If the doctrine of notice is to be applied in this manner, no married woman's estate is safe, and the statutes that have been passed for her protection are as worthless as waste paper; for whenever her husband goes into a conspiracy to strip her of her lands, the transaction is not likely to be attended with any circumstances of notice that are susceptible of proof. Here, for instance, is a mortgage made upon Mrs. Michener's separate estate, made to a conveyancer, and duly witnessed and acknowledged, which, for aught that appears of record, she never saw nor heard of until she was sued upon it by this *scire facias*. Her name appears to the printed copy on our paper books, but when and by whom it was subscribed to the original instrument does not appear. It certainly was not there when the alderman witnessed and acknowledged the mortgage. The statute requires the signature to precede the acknowledgment, and without signature and acknowledgment according to the statute, it is not and cannot be a mortgage of her estate. To call the mortgagee a *bona fide* purchaser, and to put her to proof that he knew she had been cheated, would be like making her

right to reclaim stolen goods dependent on the receiver's knowledge of the felony. Suppose the mortgage was a forgery, out and out, and Cavender chose to invest his money in a purchase of it, must it be enforced because he did not know he was buying a forged instrument? An instrument known to be forged would not be purchased, and would, therefore, be worthless to the forger. Counterfeit notes would never be issued if a herald went before to proclaim their spuriousness. But because they are taken without notice, do they become genuine? Is every bank and individual to redeem whatever obligations *bona fide* holders may obtain against them, without regard to the question whether the obligation was ever issued or not?

To carry the doctrine of notice to such extent would subvert all law and justice. A purchaser of real estate who finds the deeds in the channel of the title all duly acknowledged, is certainly not required to go up the stream and inquire of every married woman if she executed her deed voluntarily, and acknowledged it according to law; and if he pay his money on the faith of such title deeds, he is to be protected, and this probably is all that was meant by what judges have said about purchasing without notice. But a mortgagee is not a purchaser of an estate, though for the purposes of the recording acts he is sometimes treated as one. He acquires neither an equitable nor a legal estate in the premises mortgaged. He is simply a lien-creditor—a holder for a security of money. His assignee takes the mortgage, subject to all defenses, unless he inquire of the mortgagor and learn that there are none. And he is in no better condition than his assignee. It is not usual, I know, for mortgagees to watch the execution and acknowledgment of the instrument. They generally rely on the integrity of the judicial officer who certifies the acknowledgment. But where the estate is that of a married woman, and the mortgagee is himself a conveyancer, and holds, as from the recitations of this mortgage we perceive Mr. Cavender holds, other mortgages against the same married woman, we are of opinion that before he advanced more money on the faith of her estate, it was his duty to consult her. The doctrine of notice, as deduced from the adjudged cases, does not apply here. It was never intended for such a case as this. Intolerable as the duress or fraud was in the Schrader and Loudon cases, the fraud here was far more gross. The only excuse the alderman gives for his reckless conduct is, that "George told me it was a temporary matter, and that he would

make it all right if Mr. Cavender objected." To George and the alderman, Mr. Cavender must look to make it all right; but he must not touch Mrs. Michener's separate estate by means of such a mortgage.

The judgment is reversed.

ACKNOWLEDGMENT OF DEEDS BY MARRIED WOMEN: See *Louden v. Blythe*, 67 Am. Dec. 442, note 445, where other cases are collected. A magistrate's certificate of a wife's voluntary acknowledgment of her conveyance of real estate is not conclusive in cases of fraud or constraint: *Hall v. Patterson*, 51 Pa. St. 290, citing the principal case. In cases of fraud, imposition, or duress, parol evidence is freely admitted to overthrow a certificate of acknowledgment: *McCandless v. Engle*, Id. 313, also citing the principal case.

THE PRINCIPAL CASE IS DISTINGUISHED in *McMurtrie v. Twitchell*, 11 Phila. 253.

BLANCHE v. BRADFORD.

[88 PENNSYLVANIA STATE, 344.]

GOODS OF TENANT'S WIFE FOUND ON DEMISED PREMISES ARE SUBJECT TO DISTRESS for rent, although they are her separate property. This rule of law is not altered by the married woman's act of 1848.

REPLEVIN brought by Elthea Blanche, wife of Louis Blanche, against V. L. Bradford, to recover certain household furniture which was seized by order of Bradford in a house which had been leased by him to said Blanche. The defendant avowed the taking of the goods for rent due by Blanche. To this, Mrs. Blanche pleaded that the goods distrained were her own separate property. To this plea, the defendant demurred, and the court below sustained the demurrer. The jury found for the defendant, and the plaintiff sued out a writ of error.

Dennis, for the plaintiff in error.

Rey, for the defendant in error.

By Court, **LOWRIE, C. J.** The general rule of law makes all the goods and chattels found on demised premises subject to distress for the rent thereof, even though they be not the tenant's goods. Some exceptions to the rule, so far as it affects the goods of strangers, have been found necessary, growing out of its incompatibility with the very purpose of the lease. None of the exceptions, however, involve any principle that can be extended to the protection of the goods of the tenant's wife, living with him on the premises. In fact, she is no stranger to the lease, but one of the family for whom it was obtained,

and therefore one of the tenants under it; her relation to her husband makes her so. She participates in the benefit of the lease, and there is no sufficient reason for saving her from liability for its burdens.

The special law, called the married woman's act of 1848, was evidently not intended to alter this general law of landlord and tenant, and we do not think that it ought to be extended by construction to do so. If this woman had not been a wife, but merely a tenant under the lessee of part of the house, she would have been a *feme sole*, and yet her goods would have been liable to distress for the rent. That she, as a wife, is under the control of her husband, and that he may endanger her property by a too expensive rent, are necessary results of the marriage relation, which no course of legislation or jurisprudence can prevent.

Judgment affirmed.

DISTRESS FOR RENT: See *Martin v. Black*, 38 Am. Dec. 574, note 576, where other cases are collected. Goods of a tenant's wife, found on the demised premises, are liable to distress for rent in arrear, although they are her separate property: *Murphy v. Borland*, 92 Pa. St. 90, citing the principal case.

HOTZ'S ESTATE.

[28 PENNSYLVANIA STATE, 422.]

TESTATOR MAY, BY PROPER WORDS OF LIMITATION, RESTRICT ENJOYMENT OF BEQUEST to the period during which his legatee shall remain unmarried.

BEQUEST OF INTEREST OF CERTAIN FUND, TO BE PAID TO LEGATEE during all the term that she shall continue the widow of the testator's son, with a disposition of the fund to others at the termination of the bequest by her marriage, is not a bequest *in terrorem*, and is valid.

APPEAL from the orphans' court of Philadelphia. The appeal was taken by Charlotte B. Hervey, late Charlotte B. Hotz, from the decree dismissing her petition for a decree directing the executors of the last will of Peter Hotz to pay over to her an annuity left to her under said will. The respondents answered, alleging that in consequence of the marriage of the petitioner, she was no longer entitled to the interest claimed by her. The other facts necessary to an understanding of the case are stated in the opinion delivered in the orphans' court by Thompson, P. J.

On hearing the case, the orphans' court, Thompson, P. J., delivered the following opinion:

“The distinction between a bequest to which a condition is appended in restraint of marriage and a limitation of an annuity or bequest, to continue as long as a woman remains unmarried, has been fully recognized by our decisions.

“The condition annexed to such a bequest, by which it is to be defeated upon marriage, is void as against public policy: *McIlvaine v. Gethen*, 3 Whart. 575; *Commonwealth v. Stauffer*, 10 Pa. St. 354 [51 Am. Dec. 489]; but by proper words of limitation, a testator may restrict the time for the enjoyment of his bequest to the period during which the party receiving it shall remain unmarried: *Hoopes v. Dundas*, Id. 75; *Bennett v. Robinson*, 10 Watts, 351.

“The difference between a condition in restraint of marriage and a limitation designating marriage as the extent of the bequest is a narrow one, and in some cases the difficulty is to ascertain to which class a bequest belongs. A limitation over in case of the breach of such a condition has sometimes been held to make the condition available.

“The case before us is not embarrassed with any such difficulty. The testator, from and immediately after the decease of his wife, gives to his executors the sum of five thousand dollars, in trust, to place the same at interest, and directs the payment of the interest in the following terms:

“‘And pay the interest and income when and as the same shall be received, unto my daughter-in-law, Mary K. Hotz, wife of my son Peter, if she shall be living and the wife and widow of my said son, for her sole or separate use, upon her own receipt, and for and during all the term she shall continue the wife or widow of my said son.’

“‘There is no doubt,’ says Kindersley, V. C., in *Lloyd v. Lloyd*, 10 Eng. L. & Eq. 143, ‘that a testator may give an annuity either to his wife or a stranger, to continue so long as she remains single and unmarried.’

“In this bequest, no prior estate or interest is given to Mrs. Hotz for life, or for any other period to which a condition is appended. The interest of the fund is directed, in the first instance, to be paid to her for and during all the term she shall continue the widow of testator's son. No estate is to be defeated by her marriage, for none is given. The period of her marriage is fixed as the limit at which the payment of the interest is to cease as to her, and then the same is given over to another beneficiary.

“The direction to pay ‘to her sole and separate use’ does

not, in this case, indicate any other intention. In *McIlvaine v. Gethen*, 3 Wheat. 575, such a direction was referred to as raising a doubt as to intention; but in this case, the direction is inapplicable to the bequest of Mrs. Hotz, then the wife of testator's son, inasmuch as the payment was to be made to her during her husband's life, if he survived the testator, and was designed to be made to her alone. The legacy was to her, if a wife at testator's death, for her sole and separate use, and to continue during the period she should be the wife or the widow of the son. The purpose of this direction is manifest, and no doubt is raised by it as to the intention of the testator to limit the bequest to the widowhood of the legatee.

"No other expressions in the will indicate any other intention. In case of the marriage of the annuitant, the testator directs that the interest and income of the trust fund shall be paid to her daughter, if then living, for and during the term of her life; and further, in case of the termination of the interests bequeathed as to the sum so held in trust, the said sum is expressly included in the residue of the estate, and bequeathed to the three daughters of the testator.

"It appears, therefore, that the bequest was a restricted one, with a limitation over for life to another, at its termination by marriage; and a further disposition of it, if, by the decease of the second *cestui que trust*, the fund should come into the residue of the estate. Under no fair construction can this be considered a bequest upon a condition *in terrorem*.

"The decease of the daughter, to whom the annuity was limited for life, before the marriage of her mother took place, did not affect or enlarge the interest of the widow, and the fund goes over under the terms of the will, which dispose of it as part of the residue of the estate.

"The prayer of the petitioner must be refused, and the petition dismissed."

The petitioner appealed from the decree of the orphans' court.

A. V. Parsons, for the appellant.

Eli K. Price, for the appellees.

By Court, THOMPSON, J. All the requirements of this case are so fully met and covered by the opinion of the learned president of the orphans' court, that we are saved the labor of any additional investigation of the points raised, and affirm

the decree for the reasons therein given; citing only, in addition to the authorities he has cited, the case of *Connell v. Lovell*, 35 Pa. St. 100. It fully sustains the doctrine announced in this case.

Decree affirmed at the costs of the appellees.

BEQUEST TO LEGATEE WHILE HE OR SHE REMAINS UNMARRIED.—The general subject of devises and conditions in restraint of marriage is treated at length in the note to *Coppage v. Alexander's Heirs*, 38 Am. Dec. 156–161. A devise to a person, as long as he or she shall remain unmarried, is a devise upon a limitation, and not upon a condition. "An estate upon limitation is one which is made to determine absolutely upon the happening of some future event, as an estate to A, so long as she remains a widow. The technical words generally used to create a limitation are conjunctions relating to time, such as 'during,' 'while,' 'so long as,' 'until,' etc.:" Tiedeman on Real Property, sec. 281. Where words circumscribe the continuance of the estate, and mark the period which is to determine it, they are words of limitation; when they render the estate liable to be defeated, in case the event expressed should arise before the determination of the estate, they are words of condition: 2 Washburn on Real Property, 4th ed., 26, sec. 28. A devise upon a limitation is not regarded as a devise in restraint of marriage, and is not, therefore, invalid. And the estate thus given is determined upon the marriage of the devisee: *Royal v. Smith*, 28 Ga. 262; *Rumsey v. Durham*, 5 Ind. 71; *Harmon v. Brown*, 58 Id. 207; *Brown v. Harmon*, 73 Id. 412; *Tate v. McLain*, 74 Id. 493; *O'Harrow v. Whitney*, 85 Id. 140; *Hibbits v. Jack*, 97 Id. 570; *Vance v. Campbell's Heirs*, 1 Dana, 229; *Hammett v. Hammett*, 43 Md. 307; *Pringle v. Dunkley*, 14 Smed. & M. 16; *Dumey v. Schoeffler*, 24 Mo. 170; S. C., 69 Am. Dec. 422; *Bateman v. Bateman*, 24 N. J. Eq. 70; *Chapin v. Marvin*, 12 Wend. 538; *Beekman v. Hudson*, 20 Id. 53; *Rodgers v. Rodgers*, 7 Watts, 15; *Bennett v. Robinson*, 10 Id. 348; *Hawkins v. Skeggs*, 10 Humph. 31; *Little v. Birdwell*, 21 Tex. 597; S. C., 73 Am. Dec. 242. On this subject, Jarman in his work on wills says: "But a bequest during celibacy is good; for the purpose of intermediate maintenance will not be interpreted maliciously to a charge of restraining marriage. This is not a subtlety of our law only. The civil law made the same distinction, and no gift over is required to make the restriction in this form effectual:" 2 Jarman on Wills, 5th ed., 45.

In *Bennett v. Robinson*, 10 Watts, 350, Gibson, C. J., in considering a devise in these words, "I allow my wife one third of the profits arising off all my real estate only so long as she remains my widow," said: "Now, this is not a devise upon condition, but a plain and distinct conditional limitation which was spent by the contingency of her marriage, even without entry by the heir or a devise over."

In *Harmon v. Brown*, 58 Ind. 207, the property was devised to the widow "during her widowhood only," and was to be possessed and enjoyed by her only "during her widowhood." And it was further provided in the will that when she ceased to be the testator's widow, and his youngest children came of age, the property was to be divided equally among all the testator's heirs. And Worden, J., delivering the opinion of the court in that case, said: "The words employed by the testator, however, in defining the quantity of estate to be taken by the widow, are words of limitation, and not of condition. The estate was limited to her during her widowhood. No greater estate was de-

vised to her. The estate thus devised to her was not attempted by the will to be cut down by any condition whatever. Doubtless, if the testator had devised to his widow an estate for life or in fee dependent upon the condition that she should not marry, the devise would have been good and the condition void; but such is not the case here. Here, as has been already said, the estate was limited to her during her widowhood. A man may devise property to his widow during her widowhood. He is not obliged to devise to her a larger estate, as for life or in fee, in order to accomplish that purpose. But if he desires to devise a larger estate, as for life or in fee, and so expresses himself in his will, but makes it dependent upon the condition that she should not marry, the condition will be regarded as *in terrorem*, and void. Such a condition will not cut down an estate to a period less than that to which it is limited."

And in the case of *Hibbitts v. Jack*, 97 Ind. 570, where the testator devised lands to his wife with this limitation, "So long as she shall remain my widow," Niblack, J., delivering the opinion of the court, said: "Our conclusion, therefore, necessarily is, that the words used in the devise before us in this case were words of limitation merely, and not of condition in restraint of marriage."

As a general rule, a devise upon a condition in general restraint of marriage is contrary to public policy, and therefore void: 2 Pomeroy's Eq. Jur., sec. 923. But a condition in restraint of the second marriage, whether of a man or woman, is not void: *Allen v. Jackson*, L. R. 1 Ch. Div. 399; *Bossick v. Blades*, 59 Md. 231; S. C., 43 Am. Rep. 548; *Dumey v. Schoeffler*, 24 Mo. 422; S. C., 69 Am. Dec. 422. But see *Coon v. Bean*, 69 Ind. 474; *Stilwell v. Knapper*, Id. 558; S. C., 35 Am. Rep. 240; *Parsons v. Winslow*, 6 Mass. 178; S. C., 4 Am. Dec. 107. In the case of *Allen v. Jackson*, *supra*, James, L. J., said: "It has been most distinctly settled that with regard to the second marriage of a woman, that law does not apply; that whether the gift be a gift to a widow by a husband, or a gift to the widow by some other person, the law does not apply to that case, and that such a condition is perfectly valid."

And Baggalay, J. A., in the same case said on this subject: "Now, the present state of the law as regards conditions in restraint of the second marriage of a woman is this, that they are exceptions from the general rule that conditions in restraint of marriage are void, and the enunciation of that law has been gradual. In the first instance, it was confined to the case of the testator being the husband of the widow. In the next place, it was extended to the case of a son making the will in favor of his mother. Then it was held to be a general exception by whomsoever the bequest may have been made."

YORK COUNTY BANK v. CARTER.

[88 PENNSYLVANIA STATE, 446.]

INSOLVENT DEBTOR MAY PREFER ONE CREDITOR TO ANOTHER BY JUDGMENT or deed, in any mode except by an assignment in trust, if his motive be to pay the preferred debt, although the creditors not preferred may be thereby delayed or wholly prevented from obtaining payment.

INFERENCE THAT SALE WAS INTENDED TO DELAY OR DEFRAUD UNPREFERRED CREDITORS of the vendor cannot be drawn from the mere fact

that such sale necessarily gave a preference to the creditors whose debts were provided for by it, to the exclusion of creditors not so provided for, where the price agreed to be paid was the full value of the property at the time, and the purchase-money was intended by both seller and buyer to be applied to the payment of particular debts of the seller.

SALE WITHOUT RESERVATION, FOR FULL PRICE, FOR PURPOSE OF PAYING CERTAIN DEBTS of the vendor, and with that intent, is a lawful and honest transaction. And a jury is not at liberty to deduce fraud from that which the law pronounces honest.

CONVEYANCES ON THEIR FACE IMPORTING SALE, AND NOT CREATION OF TRUST for the benefit of creditors, may be shown by parol evidence to have been intended to create a trust for creditors, but whether or not they were so intended, is a question for the jury, and not for the court.

DECLARATIONS OF VENDOR WHILE POSSESSION OF PROPERTY TRANSFERRED WAS BEING DELIVERED are admissible in evidence as part of the *res gestæ*.

EVIDENCE THAT VENDEE ASSUMED TO PAY DEBTS OF VENDOR IS ADMISSIBLE to rebut an allegation of fraud in the sale; and so also is evidence that before the date of the sale the vendee had borrowed money to loan it to the vendors.

ERROR to the common pleas of Schuylkill county. The York County Bank had obtained a judgment against John Carter, surviving partner of the firm of J. & R. Carter. A *fi. fa.* issued thereon, under which the sheriff levied upon certain personal property, as the property of said firm. This property was claimed by William T. Carter, whereupon an issue was directed to try the title to the property. The fourth point of the plaintiffs in error, which is referred to in the opinion, is as follows: "If the jury believe the evidence of Edwin Booth, F. N. Buck, and other witnesses in the cause, that Richard Carter and William T. Carter stated that the object of these assignments was to pay certain particular creditors, and the design and intention of the transfer of their property was to prevent, hinder, or delay another class of creditors, then the assignments were void, and William T. Carter has shown no title to the property in controversy, and the verdict should be in favor of the defendants." In answer to this point, the court instructed the jury as follows: "If they believed from the evidence in the case that the design and intention of the transfer of the property by J. & R. Carter was to prevent, hinder, or delay any of their creditors, and William T. Carter knew of such design and intention, and participated in it, the transfer would be void as to the creditors intended to be hindered and delayed in the collection of their debts, the jury should find for the defendant." There was a judgment for the plaintiff below. The other facts appear from the opinion.

James H. Campbell, Anson V. Parsons, and Edward Owen Parry, for the plaintiff in error.

R. M. Palmer, J. Ryan, and F. W. and J. Hughes, for the defendant in error.

By Court, STRONG, J. In the court below, the bill of sale and the conveyances from J. & R. Carter to William T. Carter were assailed, on the ground of alleged fraud in fact, and here was the main battle-ground in the case. The defendants contended that they were made to delay, hinder, or defraud particular creditors, and were consequently void as against those creditors.

The several transfers of property had been made ostensibly to provide for the payment of certain creditors of J. & R. Carter. It was alleged that William T. Carter, the transferee, was a creditor to a considerable amount, and that the consideration for the conveyances to him was the satisfaction of the claim which he held against the grantors, and his assumption to pay the balance of the purchase-money in discharge of the debts due certain other specified creditors. It was distinctly submitted to the jury to find whether the transaction was *bona fide*; whether the intention of the parties was honest; whether the sale was for a fair price; whether William T. Carter was in truth a creditor to the extent claimed by him; and whether the bills of sale and conveyances were made with the honest intent to pay the debts of J. & R. Carter, or with a design to hinder, delay, or defraud those creditors to whom the purchase-money was not stipulated to be paid.

If we may judge from the points presented in the court below and from their argument here, the prevailing idea of the plaintiffs in error seems to have been that the conveyances to William T. Carter were void under the statute of 13 Elizabeth, because their effect was to postpone the creditors of J. & R. Carter not preferred, to those creditors to whom the purchase-money was stipulated to be paid. There is, however, a distinction to be observed between the effect of a conveyance by a debtor in failing circumstances, made to pay one or more of his debts, and that intent to hinder and delay his other creditors, against which the statute of 13 Elizabeth is aimed. An insolvent debtor may prefer one creditor to another, either by judgment or deed, in any mode except by an assignment in trust. The effect of such preference may be to delay a creditor not preferred—in fact, to prevent his obtaining payment at all;

but if the motive, the honest intent, was to pay the preferred debt, the transaction is not invalidated by the statute. The statute of 13 Elizabeth is aimed only at intended fraud. But the payment of a debt to one creditor is no fraud upon another creditor, no legal injury to him. It was remarked incidentally by Chief Justice Gibson, in *Gans v. Renshaw*, 2 Pa. St. 36 [44 Am. Dec. 152], that "though an insolvent debtor may give such preferences to particular creditors as he may see proper, yet if the motive be not payment of his debts, but, in the language of the statute, to 'delay, hinder, or defraud' particular creditors, the conveyance, though made on valuable consideration, is not *bona fide*, and therefore not saved by the proviso." This, however, does not militate at all against the well-settled doctrine that a debtor may prefer one creditor to another intentionally, and if his honest purpose be to pay a debt, the preference is not fraudulent, either in law or in fact. Other creditors may be delayed and hindered, but "not in a fraudulent manner," as was said by Tilghman, C. J., in *Wilt v. Franklin*, 1 Binn. 514 [2 Am. Dec. 474]. Whether the conveyances to William T. Carter were in truth made for the payment of debts, or whether there was a fraudulent intention to hinder, delay, or defraud other creditors of J. & R. Carter, was, as we have said, fairly and distinctly submitted to the jury.

We have made these remarks as introductory to a consideration of the specific assignments of error, because they bear more or less directly upon them all.

The plaintiffs in error complain that the court affirmed the second proposition of the plaintiff below, which was, "that if the jury believe that the price agreed to be paid by William T. Carter was the full value of the property at the time, and the purchase-money was intended by both seller and buyer to be applied to the payment of particular debts of J. & R. Carter, there can be no inference that such sale was intended to delay or defraud creditors whose debts were not provided for by the sale, although such sale necessarily resulted in giving the creditors whose debts were thus provided for a preference, to the exclusion of creditors not so provided for."

If the remarks which we have already made are correct, there was no error in affirming this proposition. The "inference" spoken of is one to be drawn from the supposed facts enumerated in the point, and the jury had no right to infer fraud from those facts alone. We have already shown that a sale by a debtor, at a full price, intended by both buyer and

seller for the payment of particular debts of the vendor, is a lawful sale, and none the less so because other creditors may be prevented or hindered by it from obtaining payment. Such is the doctrine of *Uhler v. Maulfair*, 23 Pa. St. 481; and such is everywhere the doctrine of the common law, except where a bankrupt law exists. There is no warrant for the assertion that the court took away from the jury the right to find whether the sale was made with an intent to hinder, delay, or defraud any creditors. On the contrary, if there is any one thing prominent in the whole charge, it is the submission to the jury to find from the whole evidence whether there was such an intent. Thus, in addition to very much in the general charge, the court said, in answer to the first and second points of the plaintiffs in error, that if the bills of sale and conveyances by J. & R. Carter to William T. Carter were made to delay, hinder, or defraud particular creditors, though made for a valuable consideration, they are not *bona fide*, but void. And again, that even if the jury should find from the evidence that William T. Carter agreed to assume the payment of certain debts of J. & R. Carter as the consideration of the assignment of their property, but that the design was to delay or hinder other creditors from the collection of their debts, which were not assumed by him, the transaction is void. And once more: "If, after a fair and careful consideration of the proof given by both parties to this issue, you come to the decision that it was the intention of the parties to the bills of sale to hinder, delay, or defeat the creditors not preferred, you will render your verdict for the defendants." Much more of a similar character might be added, but this is enough to vindicate the court against the allegation that they restrained the jury from drawing any just inference of fraud from any of the facts in evidence. A sale for a full price, with no reservation, for the purpose of paying certain debts, and with that intent, is a lawful and honest transaction. Whether it was such a sale was left to the jury. If it was, then no unfavorable inferences were to be drawn from it. A jury is not at liberty to deduce fraud from that which the law pronounces honest.

The next error assigned to the charge is, that the court affirmed the plaintiff's third point. That point was, "that if J. & R. Carter believed the demands of the creditors of Carter, McCauley, & Co. had less equity than those of their other creditors, on account of their nature and origin, and that they should be postponed until the others were paid, they had

a right to prefer the others, and in doing so they did no more than any honest man under such circumstances ought to have done."

The answer of the court is justified by what was said in *Uhler v. Maulfair*, 23 Pa. St. 481. It was nothing more than an affirmance of the right of a debtor to prefer one creditor to another, though the effect of the preference be to postpone the one not preferred.

The same remarks are applicable to the exception taken to what was said by the court in answer to the plaintiff's fourth point. It is not to be doubted that a debtor may lawfully sell his property in consideration that the purchase-money be paid to some of his creditors to the exclusion or postponement of others, if it be done without any fraudulent design—that is, without any other intention than to prefer one to the other. He may not, indeed, sell to one creditor in payment of his claim and take securities for the residue of the consideration, payable at a distant day, though he designs them to pay other creditors, for that is not a present application of his property to the payment of debts, and that is all which was decided in *Burkhart v. Kepner*, 5 Pa. St. 478.

All the points proposed by the plaintiffs in error to the court below were affirmed without qualification, except the third and fourth. It is now assigned for error that the court refused to affirm the third. We quote that point at length. It was, "that it being an undisputed fact in the cause that John and Richard Carter were indebted more than one hundred and thirty thousand dollars on the first of October, 1857, the date of the transfer of their property to William T. Carter, and there being no evidence that he paid any money at the time of the transfer, but only assumed to pay certain debts particularly mentioned, many of which were liens on the real estate conveyed on that day, and it being proved that there were other debts to a large amount not assumed by him, those bills of sale, and the transfer and conveyances in evidence, gave him no title to the property which is now the subject of controversy, and are void as against the defendants in this suit.

Here we have the court asked to rule, as a matter of law, that the conveyances were void, and that without any regard to the question whether they were intended to hinder or delay creditors. The request is but a reassertion of the principle which we have shown to be not well founded—that a debtor, in failing circumstances, may not sell his property for a full

price, and direct all the consideration for the sale to be paid in discharge of a portion of his debts; in other words, may not prefer one creditor to another. The court had no right to take the case from the jury, as requested, for there was nothing in the transfers themselves, nor in them coupled with the facts that J. & R. Carter were largely indebted, and that the sale was made to secure the payment of certain debts rather than others, that made the transaction a legal fraud.

There is another view of this point which has been presented in the argument here, that seems not to have been urged in the court below. That court was not asked to instruct the jury respecting it, and if it was alluded to at all, it was only darkly shadowed forth. It is that the transaction of October 1, 1857, between J. & R. Carter and William T. Carter, amounted to an assignment in trust for certain preferred creditors, and as the statutory requirements to protect assigned property against execution creditors, to wit, recording had not been complied with, the court should, for that reason, have declared the transfers void. The difficulty in the way of this view is, that the bills of sale and conveyances on their face import a sale, and not the creation of a trust for the benefit of creditors. If the transaction was in fact an assignment, and not a sale, it required to establish it as such other evidence than what was furnished by the papers. Doubtless, the conveyances might have been shown by parol evidence to have been intended to create a trust for creditors. Whether it was so shown was a question for the jury, and not for the court. But had the court affirmed the third point of the plaintiffs in error, they would have passed conclusively, not only upon the credibility of witnesses, but upon the amount and meaning of the parol evidence. We think, moreover, that this aspect of the case is not fairly presented by the point. The attention of the court was called to the validity of a transfer in consideration of an assumption to pay certain debts, while there were other debts not assumed, and we think there was no error in the refusal to give the instruction requested.

The remaining exceptions to the charge are without merit. The fourth point of the plaintiffs in error was substantially answered. That part of it which was not affirmed is not correct as a legal proposition. Nothing in the declarations of Richard Carter or William T. Carter, as proved by Booth and Buck, conclusively establish that the conveyances were void, or authorized the court to pronounce them void.

Little need be said of the exception taken to the admission of evidence. The declarations of John and William T. Carter, made while possession was being delivered of the transferred property, were a part of the *res gestæ*, and clearly admissible as such.

So was the paper by which W. T. Carter assumed to pay the debts admissible. It was in direct rebuttal of the allegation of fraud. Whether it had been delivered or not was for the jury. It bore even date with the bills of sale and the conveyances, and was attested by the same witness.

The third bill of exceptions was to the permission given to the plaintiff below to prove that, prior to October 1, 1857, he had borrowed money for the purpose of reloaning it to J. & R. Carter. It is objected that thus he was allowed to give in evidence his own declarations. This was, however, not so to the injury of the plaintiffs in error. The witness proved no declarations of William T. Carter. His testimony was that he loaned to him six thousand dollars, and received for it J. & R. Carter's paper, indorsed by him. Clearly, this was unobjectionable.

The remaining assignment of error is not pressed, and cannot be successfully.

The judgment is affirmed.

DEBTOR MAY PREFER ONE CREDITOR OR SET OF CREDITORS: See *Baldwin v. Peet*, 75 Am. Dec. 806, note 819; *Born v. Shaw*, 72 Id. 633, note 635, where other cases are collected. And he may do so by incumbrances confessed or by absolute and direct conveyances: *Witmer's Appeal*, 45 Pa. St. 462; *Miners' National Bank's Appeal*, 57 Id. 199; *Beans v. Bullitt*, Id. 232, all citing the principal case.

SALE OR TRANSFER MADE WITH HONEST INTENT IS NOT FRAUDULENT, although its tendency may be to postpone other creditors, or to prevent them from obtaining payment at all: *Bentz v. Rockey*, 69 Pa. St. 77, citing the principal case; see also *Baldwin v. Peet*, 75 Am. Dec. 806, note 818, where other cases are collected.

FRAUDULENT INTENT IS QUESTION OF FACT FOR JURY: See *Baldwin v. Peet*, 75 Am. Dec. 806, note 818, where other cases are collected.

THE PRINCIPAL CASE IS DISTINGUISHED in *Craver v. Miller*, 65 Pa. St. 459; and followed in *Olaglin v. Maglaughlin*, Id. 496.

HUTHMACHER v. HARRIS'S ADMINISTRATORS.

[33 PENNSYLVANIA STATE, 491.]

"SALE" MEANS CONTRACT BETWEEN PARTIES TO PASS RIGHTS OF PROPERTY FOR MONEY which the buyer pays, or promises to pay, to the seller for the thing bought and sold.

PURCHASE AT ADMINISTRATOR'S SALE OF "DRILL MACHINE," WHICH, UNKNOWN TO PARTIES, CONTAINED MONEY and other valuables, secreted there by the decedent, passes to the buyer the right to the machine and every constituent part of it, but not to the valuables, which, upon discovery, are held by him as treasure-trove, for the personal representative of the deceased owner.

TROVER to try title to certain money and valuables which the defendant below had found in a "drill machine" which he purchased at the administrator's sale. As soon as the property was found, the defendant gave notice of his discovery, and the result was the amicable action in this case. The other facts are stated in the opinion.

Hendrick B. Wright, for the plaintiff in error.

E. L. Dana, for the defendants in error.

By Court, WOODWARD, J. The ground on which we affirm this judgment is, that there was no sale of the valuables contained in the block of wood, which is called, in virtue of its horizontal wheel and upright spindle, "a drill machine." Sale, said Mr. Justice Wayne, in *Williamson v. Berry*, 8 How. 544, is a word of precise legal import, both at law and in equity. It means at all times a contract between parties to pass rights of property for money which the buyer pays, or promises to pay, to the seller for the thing bought and sold.

That no such contract was made by these parties in respect to the contents of the drill machine, we deduce from the agreed facts of the case. The machine itself, and every essential part and constituent element of it, were well sold. The consideration paid, though only fifteen cents, was in law a *quid pro quo*, and the sale, unaffected by fraud or misrepresentation, passed to the purchaser an indefeasible right to the machine and all the uses and purposes to which it could be applied. But the contents of the machine are to be distinguished from its constituent parts. They were unknown to the administrators, were not inventoried, were not exposed to auction, were not sold. Of course they were not bought. All that was sold was fairly bought, and may be held by the purchasers. The title to what was not sold remains unchanged. A sale of a coat does not

give title to the pocket-book which may happen to be temporarily deposited in it, nor the sale of a chest of drawers a title to the deposits therein. In these cases, and many others that are easily imagined, the contents are not essential to the existence or usefulness of the thing contracted for, and not being within the contemplation or intention of the contracting parties, do not pass by the sale. The contract of sale, like all other contracts, is to be controlled by the clearly ascertained intention of the parties.

The argument proceeded very much on the doctrine that equity will, in certain cases, relieve against mistakes of fact as well as of law; but if there was no contract of sale, there could be no mistake of fact to vitiate it, and therefore that doctrine has no possible application. Mistake is sometimes a ground of relief in equity; but a man who puts up his wares at auction, and sells them to the highest bidder, has no right to relief on the ground that he was ignorant of the value of that which he sold. Such a mistake comes of his own negligence, for it is his duty to possess all necessary knowledge of the value of that which he brings to market, and the rule is general, that if a party becomes remediless at law by his own negligence, equity will leave him to bear the consequences.

Nor could these administrators, had they sold the contents, have pleaded, in addition to their ignorance, their fiduciary character, and their possible liability for a *devastavit*, in defeat of the vested rights of the purchaser; for in respect to the personality of the decedent, they stood in the dead man's shoes, and were in fact, as they are commonly called in law, his personal representatives. The law cast the personal estate upon them for purposes of administration, and a fair sale made in pursuit of that purpose would confer as perfect a title as if made by a living owner. They, no more than any other vendor, could set aside such a sale to avert the consequences of their own negligence.

But inasmuch as they did not, in point of fact, sell the valuables which are in dispute, these principles, and all the arguments drawn from the law of mistake, are outside of the case.

If, then, there was no sale and purchase of the contents of the block or machine, how did Huthmacher, when he discovered his unsuspected wealth, hold it? Evidently as treasure-trove, which, though commonly defined as gold or silver hidden in the ground, may, in our commercial day, be taken to include the paper representatives of gold and silver, especially when

they are found hidden with both of these precious metals. And it is not necessary that the hiding should be in the ground, for we are told in 3 Inst. 132, that it is not "material, whether it be of ancient time hidden in the ground, or in the roof, or walls, or other part of a castle, house, building, ruins, or otherwise."

The certain rule of the common law in regard to treasure-trove, as laid down by Bracton, lib. 3, cap. 3, and as quoted in Viner's Abridgment, is, "that he to whom the property is, shall have treasure-trove; and if he dies before it be found, his executors shall have it, for nothing accrues to the king unless when no one knows who hid that treasure." The civil law gave it to the finder, according to the law of nature, and we suppose it was this principle of natural law that was referred to in what was said of treasure hid in a field, in Matthew's Gospel, xiii. 44.

But the common law, which we administer, gave it always to the owner, if he could be found; and if he could not be, then to the king, as wrecks, strays, and other goods are given, "whereof no person can claim property:" 3 Inst. 132. Huthmacher, therefore, held the unsold valuables for the personal representatives of the deceased owner.

Several sporadic cases, some of which were highly apocryphal, were mentioned in the argument as affording analogies more or less appropriate to this case; but it is quite unnecessary to discuss them, because, if they touch, they do not incumber the clear ground whereon, as above indicated, we rest our judgment.

The judgment is affirmed.

"SALE" MEANS CONTRACT TO PASS RIGHTS OF PROPERTY for money which the buyer pays or promises to pay to the seller for the thing bought and sold: *Bigley v. Risher*, 63 Pa. St. 155, citing the principal case; see also *Parkinson v. State*, 74 Am. Dec. 522.

LORD v. GROW.

[89 PENNSYLVANIA STATE, 88.]

VENDOR OF PERSONAL PROPERTY DOES NOT IMPLIEDLY WARRANT THAT ARTICLE SOLD IS OF SPECIES or kind contemplated by the parties, where the sale is on inspection, and the vendee's knowledge is equal to that of the vendor.

ASSUMPSIT on an implied warranty that wheat sold by the defendants to the plaintiff was spring-wheat. The plaintiff

went to the defendants, who were grain dealers, for the purpose of purchasing some seed spring-wheat. The wheat was at the mill of one of the defendants, and an order was given to the plaintiff for the quantity desired, but without any description. The plaintiff took the order to the mill, and was there shown some wheat, which the miller stated was spring-wheat. The plaintiff took the wheat, which he and the miller supposed to be spring-wheat, and sowed it, but it proved to be winter-wheat, and the plaintiff consequently lost his crop. It was admitted to be impossible for any one, upon inspection, to tell the difference between spring and winter wheat. The plaintiff requested the court to charge that if the defendants sold the wheat to the plaintiff as seed spring-wheat, there was an implied warranty that it was spring-wheat, and if it was not, the defendants were liable; but the court instructed the jury to find a verdict for the defendants. A verdict for the defendants was accordingly given, upon which judgment was entered, and the plaintiff thereupon sued out a writ of error.

W. and W. H. Jessup, for the plaintiff.

R. B. Little, for the defendants.

By Court, STRONG, J. We have here the bald question whether, in sales of personal property on inspection, without express warranty, the law presumes an engagement on the part of the vendor that the article sold is of the species contemplated by the parties. No doubt there is such an undertaking where sales are made by sample. In such cases, the vendor warrants that the bulk of the article shall correspond in kind with the sample. The tendency of the modern cases has also been to the doctrine that in sales of articles in regard to which the seller is presumed to have superior knowledge, there is a warranty that the thing sold shall be in kind what it is represented to be. Illustrations of this are found in sales of wine by wines merchants, of jewels by a jeweler, and of medicines by a druggist. In this class of cases, the buyer and the seller do not deal on equal terms. The vendor is professedly an expert. His trade invites confidence in his representations, and confidence is usually reposed. So far, in modern decisions, there has been a departure from the rule laid down in *Chandelor v. Lopus*, Cro. Jac. 4.

The case before us is not one of this character. The wheat was not sold by sample, and neither the contract of sale nor the identity of the article was defined by a bill of parcels.

Nor was the subject of the contract a manufactured article, ordered and supplied for a particular purpose. True, the difference between spring-wheat and other wheat is not ascertainable by inspection, and it may be assumed that they are not the same in species. Still, the case is one of a purchase on inspection of an article, of which the vendor's means of knowledge were no greater than those of the vendee.

Borrekins v. Bevan, 3 Rawle, 28 [23 Am. Dec. 85], which is mainly relied upon by the plaintiff in error, was a case in which it was doubtful whether the sale was or was not made by sample, or by a description in a bill of parcels. In delivering the opinion of the court, Judge Rogers used very broad language, which, however, ought to be understood as applied to the facts of that case. He said that "in all sales there is an implied warranty that the article corresponds in specie with the commodity sold, unless there be some facts and circumstances existing in the cases, of which the jury, under the direction of the court, are to judge, which clearly show that the purchaser took upon himself the risk of determining, not only the quality of the goods, but the kind he purchased, or where he may waive his right." If by this that eminent judge be understood as speaking of "all sales" by sample, or sales by bills of parcels, where the purchaser has not seen the article, and where the bill of parcels is the sole evidence of the contract, and of the identity of the thing sold, he expressed what is now the law of Pennsylvania. But that there is any such implied warranty in the ordinary case of a sale on inspection was denied in *Carson v. Baillie*, 19 Pa. St. 375 [57 Am. Dec. 659]. There the rule of the common law was plainly announced, "that where goods are sold on inspection, there is no standard but identity, and no warranty implied other than that the identical goods sold, and no others, shall be delivered. The name given to them in the bill is then immaterial, because faith was placed, not in the name, but in the quality and kind discovered on inspection." To the purchaser of goods on inspection, the language of the law is *caveat emptor*. There may be a few exceptions, such as we have referred to, but a sale of such an article as wheat is not one of them. When the purchaser has seen it, and gets what he saw, no warranty is implied that it is properly described by the name which the vendor gives to it.

The charge of the court below was therefore right.

Judgment affirmed.

IMPLIED WARRANTY OF QUALITY DOES NOT ARISE IN SALES ON INSPECTION: *Stewart v. Dugin*, 28 Am. Dec. 348; *Getty v. Rowntree*, 54 Id. 138; *Carson v. Baillie*, 57 Id. 659; *Brantley v. Thomas*, 73 Id. 284; *Eagan v. Call*, 75 Id. 653.

WARRANTY THAT ARTICLE SOLD IS OF SPECIES OR KIND CONTEMPLATED BY PARTIES, WHETHER IMPLIED: See *Seixas v. Wood*, 2 Am. Dec. 215; *Sweet v. Colgate*, 11 Id. 288; *Borrekins v. Bevan*, 23 Id. 85.

GIRARD BANK v. BANK OF PENN TOWNSHIP.

[39 PENNSYLVANIA STATE, 92.]

STATUTE OF LIMITATIONS DOES NOT BEGIN TO RUN AGAINST DEPOSIT IN BANK until demand is made and payment refused.

STATUTE OF LIMITATIONS DOES NOT RUN AGAINST CHECK MARKED "GOOD," until payment has been actually demanded at the banking-house and refused. The holder of such a check does not stand in a different position from that of an original depositor.

BANK ACKNOWLEDGES THAT MONEY REPRESENTED BY CERTIFIED CHECK REMAINS ON DEPOSIT to the credit of the holder, where it pays a duplicate check to the drawer, taking his bond of indemnity against the check, which the drawer claimed to have lost.

ASSUMPSIT by the Girard Bank against the Bank of Penn Township, to recover the amount of a check, with interest, drawn on the Bank of Penn Township, by Adam Dietrich, payable October 7, 1852. The check was indorsed to the Girard Bank, and was marked "good" by the proper officer of the Bank of Penn Township. It was mislaid by the Girard Bank, and not presented for payment until September 3, 1859, when payment was refused. The Bank of Penn Township had, on October 10, 1854, paid the money to Dietrich, on his duplicate check, taking his bond of indemnity against the certified check, which he claimed to have lost. The defendant pleaded the statute of limitations. The judge directed a verdict for the plaintiffs, subject to the opinion of the court in bank, whether, upon the evidence and the pleas of the statute of limitations, the plaintiffs were entitled to recover. The court in bank ordered judgment to be entered for the defendants, *non obstante veredicto*, whereupon the plaintiffs sued out a writ of error.

George L. Crawford and B. H. Brewster, for the plaintiffs in error.

J. P. O'Neill and Thorn, for the defendants in error.

By Court, STRONG, J. Were this a suit against the Bank of Penn Township by the original depositor, the statute of limi-

tations would be interposed in vain, not so much because a bank is a technical trustee for its depositors, as for the reason that the liability assumed by receiving a deposit is to pay when actual demand shall be made. The engagement of a bank with its depositor is not to pay absolutely and immediately, but when payment shall be required at the banking-house. It becomes a mere custodian, and is not in default or liable to respond in damages until demand has been made and payment refused. Such are the terms of the contract implied in the transaction of receiving money on deposit, terms necessary alike to the depositor and the banker. And it is only because such is the contract that the bank is not under the obligation of a common debtor to go after its customer and return the deposit wherever he may be found. Hence it follows that no right of action exists, and the statute of limitations does not begin to run, until the demand stipulated for in the contract has been duly made. For this, authorities are hardly necessary. Two were cited in the court below, and they suffice: *Union Bank v. Planters' Bank*, 9 Gill & J. 439-461 [31 Am. Dec. 113]; and *Johnson v. Farmers' Bank*, 1 Harr. 117-119.

Nor is it easy to see why the holder of a check marked "good" stands in any different position from that of the original depositor. Presenting a check and having it thus certified is clearly not a demand for the money deposited. Its purpose is not to demand payment, but to obtain evidence that the sum mentioned in the check remains on deposit to answer the check when presented. It contemplates that the bank is still to retain the custody of the money. How retain it—as a depositary, or as value paid for the acceptance of a bill of exchange? Certainly not as the latter, for then no demand at the banking-house would be necessary before suit, and the presentment of a bill payable on demand, merely for acceptance, is an absurdity. When a check payable to bearer or order is presented with a view to its being marked "good," and is so certified, the sum mentioned in it must necessarily cease to stand to the credit of the depositor. It thenceforth passes to the credit of the holder of the check, and is specifically appropriated to pay it when presented, and as the purpose of having it so certified is not to obtain payment, but to continue with the bank the custody of the money, the holder can have no greater rights than those of any other depositor. Certainly he has no right of action until payment has been

actually demanded and refused. That he stands on the footing of an ordinary depositor is the doctrine of *Willetts v. Phoenix Bank*, 2 Duer, 121. In that case, it was said by Chief Justice Oakley: "It is the duty of the officer certifying a check to cause it to be immediately charged as paid in the account of the drawer, and when this is done the sum thus charged will remain as a deposit in the bank to the credit of the check, and be forever withdrawn from the control of the maker, except as a holder of the check. Such a deposit stands exactly upon the same ground as any other. The bank, instead of being prejudiced, is benefited by the delay of the owner in calling for its payment, and can with no more propriety impute laches to the unknown holder of the check than to a known holder of an ordinary deposit." Marking a check "good," was held to be an unconditional engagement to hold a sufficient amount of the funds of the drawer to meet the check whenever it should be presented for payment: *Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank*, 4 Duer, 219, is to the same effect. The doctrine is sound. Checks on a bank marked "good" are to be regarded as evidences of deposit to the credit of the holder, and laches in making a demand for payment is no more imputable to him than to any other depositor.

These principles were conceded by the learned judge of the district court, but he was of opinion that inasmuch as there was no evidence in this case of any demand made by the holder of the check within six years from the date of the contract, the plaintiffs could not recover. The check was drawn on the seventh of October, 1852. When it was certified does not appear, but it probably was when it was drawn. It was not presented for payment until September 3, 1859. Nearly seven years, therefore, elapsed from the date of the deposit before demand was made for its return, and the question now is, whether such delay in making the demand bars the plaintiff from a recovery. If it does, then this artificial rule which is said to have been adopted in analogy to the statute of limitations is far more severe upon depositors than is the statute itself. The statute begins to run, not from the date of the deposit, but from the time when the depositor makes demand for payment, and is met with a refusal. This rule completes the bar in six years from the date of the deposit, and as it was applied in the present case, it amounts to a presumption incapable of being rebutted. On the tenth of October, 1854,

within six years from the commencement of this suit, the defendants paid the money to Adam Dietrich, the original depositor, taking his bond of indemnity against the certified check which he claimed to have lost, though in truth he had indorsed it away. This paying a duplicate check, and taking a bond of indemnity, was a distinct acknowledgment that the money then remained in bank, on deposit to the credit of the holder of the check which had been certified. It was certainly sufficient to rebut any presumption less than a conclusive one that it had been paid. Now, as no statute requires that in cases where a creditor must make a demand before he can sue, the demand shall be made within six years from the date of the contract, or action be debarred; any rule exacting demand within that time can have no other basis upon which to rest than a presumption that the debt has been paid, or the deposit withdrawn. What becomes of such a presumption in the face of a clear acknowledgment of the debtor that the debt remains unpaid, or that the deposit is a continuing one?

We cannot agree that there is any such rule applicable to an ordinary case of debtor and creditor, banker or depositor, or bailor and bailee. It would be mischievous in its operation upon contracts generally, and mischievous in the extreme when applied to contracts of bailment. And we think it would be a surprise were we to hold that banks or other corporations can defend themselves against claims for deposits or undrawn dividends on the ground that no actual demand has been made for them within six years.

In *Thorpe v. Booth*, 1 Ry. & M. 388, S. C., 21 Eng. Com. L. 776, it appeared that suit had been brought upon a promissory note dated March 12, 1813, whereby the defendant promised to pay seven hundred pounds "twenty-four months after demand." The note was not presented for payment until June 28, 1823, more than ten years after it was given. The defendant pleaded the general issue and the statute of limitations. But the plaintiff was held entitled to recover, on the ground that the cause of action did not arise until twenty-four months after the demand was actually made. That it was not made within six years from the date of the note was treated as of no consequence. This was a case between a simple debtor and creditor. There is even less reason for requiring a depositor to make speedy demand, for it would defeat the very purposes of the deposit.

It is true, there are cases, and we have been referred to some

of them during the argument, in which it was held to be incumbent upon a plaintiff to make a demand, where actual demand was necessary, within a reasonable time from the making of the contract, and generally within the time limited by the statute of limitations for bringing the action. The circumstances of all these cases are, however, peculiar, and none of them were between an ordinary creditor and debtor, or depositor and depository, or bailor and bailee for custody. The first of them is *Codman v. Rogers*, 10 Pick. 112. It was a bill in equity brought to compel the settlement of a partnership account twenty-five years after the firm had been dissolved, and nineteen years after a partial account had been settled. From 1809 to 1826 no demand was made for a further settlement. The bill was dismissed on account of the laches of the complainant. The observations made by Wilde, J., in delivering the opinion of the court, were unnecessary to the case, mere *obiter dicta*, though worthy of consideration. In remarking upon the time within which demand should be made, where demand is necessary previous to the commencement of an action, he said a demand must be made within a reasonable time, otherwise the claim is considered stale, and no relief will be granted in a court of equity. What is considered a reasonable time for this purpose does not appear to be settled by any precise rule. It must depend upon circumstances.

If no cause for delay can be shown, it would seem reasonable to require the demand to be made within the time limited by the statute for bringing the action. He then proceeded to show that the complainant had been guilty of great laches in lying by for seventeen years without making any claim, until after the death of the person whose estate he sought to charge, and until after the papers of the decedent had been destroyed by fire, and decreed that the plaintiff was not entitled to relief in a court of equity. Surely there is nothing in this case to support the doctrine that a depositor must make a demand for his deposit within six years, or be debarred from recovering it by action. Yet this case is the leader of all the others which have been cited. In *Pittsburgh and C. R. R. Co. v. Byers*, 32 Pa. St. 22 [72 Am. Dec. 770], *McCully v. Pittsburgh and C. R. R. Co.*, Id. 25, and *Pittsburgh and C. R. R. Co. v. Graham*, 36 Id. 77, it was held that the railroad company, having permitted more than six years to pass from the time of subscription to its capital stock without making calls upon the subscribers, was barred from maintaining an action.

The contract of subscription was a peculiar contract; the legislature had fixed five years as the limit within which the construction of the road should be commenced. It was the duty of the company to commence it, and to prosecute it vigorously, and of course to make the calls without delay. Nothing like a continuing relation of promisor and promisee was contemplated. The parties stood in a very different position towards each other from that which a depositor holds towards his banker, and as the company had taken no steps within the six years to prosecute their road, there was warrant for a presumption that their rights against subscribers to the capital stock had been abandoned. The only other case is *Morrison v. Mullin*, 34 Pa. St. 12. There a receipt had been given to the sheriff by a judgment creditor, for part of the proceeds of a sheriff's sale, with a stipulation that if on a settlement of the liens on the debtor's interest in the lands sold the creditor was not entitled to the money received, he would refund it, or so much as he was not entitled to retain. Twenty-two years afterwards the sheriff brought suit on the stipulation contained in the receipt, and the statute of limitations was pleaded. This court held that the action could not be maintained in consequence of the sheriff's delay in procuring a settlement of the liens. In fact, the twenty years' presumption stood in the way of recovery.

In delivering the opinion of the court, Mr. Justice Thompson referred to the rulings in *Codman v. Rogers*, 10 Pick. 112, and *Pittsburgh etc. R. R. Co. v. Byers*, 32 Pa. St. 22 [72 Am. Dec. 770], but without laying down or intending to assert a general doctrine that where demand is necessary under a simple contract before bringing an action, it must in all cases be made within six years from the date of the contract.

Indeed, all the cases, from *Codman v. Rogers*, 10 Pick. 112, down, when speaking of the reasonable time within which demand ought to be made, and defining it as generally the statutory period for limitations, add, "when no cause of delay is shown." Even this qualification is an important one as applied to the present case. An early demand would have defeated the object of the deposit, and the certified check was mislaid for years.

Upon the whole, we find nothing in the adjudicated cases which requires us to hold that a depositor is barred of his action against his banker by delaying to call for his deposit more than six years from the time when he placed the money

in bank. And we think such a doctrine would be alike impolitic and unjust.

The judgment for the defendants, *non obstante veredicto*, must therefore be reversed, and judgment entered on the verdict for the plaintiffs.

Judgment reversed, and judgment on the verdict for the plaintiffs.

STATUTE OF LIMITATIONS, WHEN RUNS AGAINST DEPOSIT IN BANK: See note to *In the Matter of the Franklin Bank*, 19 Am. Dec. 420. In general, where a deposit is made to be returned on demand, the statute of limitations does not begin to run until after demand made: *Finkbone's Appeal*, 86 Pa. St. 369; and see *Smith v. Bell*, 107 Id. 360, both citing the principal case; but this rule does not apply to a promissory note payable on demand; the statute runs from its date: *Milne's Appeal*, 99 Id. 490; *Taylor's Adm'rs v. Witman's Adm'rs*, 3 Grant Cas. 146, distinguishing the principal case.

DEMAND OF BANK IS NECESSARY BEFORE ACTION FOR GENERAL DEPOSIT CAN BE MAINTAINED: Note to *In the Matter of the Franklin Bank*, 19 Am. Dec. 420; compare *Watson v. Phoenix Bank*, 41 Id. 500. The principal case is an authority on this proposition in *Brahm v. Adkins*, 77 Ill. 265; and a demand is likewise necessary before an action can be maintained upon an ordinary certificate of deposit: *Brown v. McElroy*, 52 Ind. 407, citing the principal case.

CERTIFYING CHECK, WHAT OBLIGATION IT IMPOSES: See *Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank*, 69 Am. Dec. 678, and note; and see the principal case cited on this point in *Merchants' Bank v. State Bank*, 10 Wall. 649.

YOUNG'S APPEAL.

[39 PENNSYLVANIA STATE, 115.]

WILL IS NOT ANY LESS SUBJECT TO REVOCATION BY OPERATION OF LAW because it is made by a woman under the special power contained in a marriage settlement, instead of under the general power granted by law.

WILL IS REVOKED BY IMPLICATION, if the circumstances of the testator be so altered that new moral testamentary duties have accrued to him subsequent to the date of the will, such as may be presumed to produce a change of intention.

WILL OF MARRIED WOMAN IS REVOKED BY SUBSEQUENT BIRTH OF CHILD, but only so far, under the statutes of Pennsylvania, as the child would have taken without the will.

APPEAL of John Henry Weir Young from a decree of the orphans' court of Philadelphia, dismissing his exceptions, and confirming the report of the auditor, appointed to settle and adjust the account of the executors of the will of the appellant's mother, Anna Maria Young, and to report distribution. By an antenuptial settlement, Mrs. Young conveyed all her

property to trustees for herself for life, with power of disposition by will, the settlement providing that in case of her intestacy the trustees should hold the property in trust for her legal heirs and representatives, to the exclusion of her husband. On April 7, 1859, Mrs. Young disposed of all her property without providing for or mentioning the appellant, who was afterwards born, on June 19, 1859, the day before his mother's death. The testatrix left surviving her her husband, Dr. William Young, a daughter, Elizabeth, four years old, and the appellant. The auditor reported that Mrs. Young did not die intestate, as regards the appellant, and excluded him from all participation in his mother's estate. The appellant filed exceptions to this report, but the court dismissed them, confirmed the report, and ordered distribution accordingly, whereupon an appeal was taken.

Samuel H. Perkins, for the appellant.

Joseph A. Clay, for Elizabeth Young.

George Junkin, for Dr. William Young.

By Court, LOWRIE, C. J. We have no doubt that this will is to be regarded as made under the special power contained in the articles of marriage settlement, and not under the general power granted by law; but we do not think that it is, on this account, any the less subject to revocation by operation of law, when the circumstances attending it bring it within the reason of the law. In either case, the will is a private law of descent and distribution, and if revoked at all by operation of the general law, it is because of some defect in itself, and not because of the authority or power on which it is grounded, but entirely irrespective of this. The will is set aside wholly or partially because the law presumes that it does not express the final intention of the testator, and this reason of the law takes no notice of whether the power to make the will comes from public law or from private contract.

Then is there a revocation here by operation of law? We think there is, and we do not need to go out of the argument made in this case, and the cases referred to in 1 Williams on Executors, 94, and the case of *Marston v. Roe*, 8 Ad. & El. 14, in order to explain how it is.

The principle of the common law of the revocation of wills by the subsequent birth of issue is stated thus: If the testator's circumstances be so altered that new moral testamentary

duties have accrued to him subsequent to the date of the will, such as may be presumed to produce a change of intention, this will amount to an implied revocation. Now, it matters not whether it be said that this principle was derived from the Roman law or from our human instincts of justice, certainly it is now a legitimate element of our common law, and we would not have received it but for those instincts. The Romans received it before us because they were before us, and because they, too, were human.

This principle gives the fundamental reason of all the positive rules of law we have on this subject. There are subordinate reasons everywhere varying the rules according to the laws of descent. The positive rules are given sometimes by statute, and sometimes by judicial decision; but they are all attempts, more or less adequate, to give expression to this principle of the common law, in its application to different classes of cases. And the most positive of these rules are sometimes changed merely incidentally, by a change in the law of descents. For the law does not do or require vain things. It does not revoke when the person supposed to have been unintentionally left unprovided for could have gained nothing by the revocation, or could do just as well without it. It would not revoke in favor of a widow who has quite as good a remedy by election.

In England, the laws of descent of real estate are so different from those of the distribution of personal estate that this principle had to be expressed in different positive rules in relation to each. But with us it is not so; and our act of the fourth of February, 1748-49, and still in force by re-enactment, fits our system of intestates' estates, both real and personal. The purpose of the principle, it is fully quoted by Rogers, J., in 1 Whart. 219, is to correct the evil of an unintentional omission in a will, and the rule embodied in our statute is an improvement on the earlier judicial expressions of it; for it avoids the will only so far as affects the share which the neglected person would have taken without the will. Even the recent statute of 1 Vict., c. 26, sec. 18, which applies to wills of man and woman, and to those under a power of appointment, as well as under general law, is not so considerate; for it makes the revocation entire. Of course no one could claim a revocation who would take nothing by descent.

We must declare this a case of intestacy so far as relates to

the appellant, a son of the testatrix born after the making of the will. Then looking back at the articles of nuptial settlement, we find that they provide that in case of intestacy, the trustees shall hold the property in trust for her legal heirs and representatives, to the exclusion, however, of her husband. It follows, therefore, and from the fact that she had but one other child, that she is intestate of one half of her estate, and that that half goes to the trustees appointed by the nuptial settlement, for the use of the appellant. It follows, also, from the case of *McKnight v. Read*, 1 Whart. 213, that the will having failed as to half of the estate, all the annuities and other legacies are to be abated one half, and then to be paid out of the other half of the estate.

DECREE.—May 6, 1861. This cause came on for hearing at the late term of the court at Philadelphia, on the appeal of John Henry Weir Young, from the decree of the orphans' court of Philadelphia, and was argued by counsel; and now, on mature consideration thereof, it is ordered, decreed, and declared that the testatrix, Anna Maria Young, died intestate as to one half of her estate, except as to the appointment of executors thereof, and that the said one half ought to be distributed to the trustees named in the articles of marriage settlement referred to in the proceedings, in trust for the appellant; that the annuities and other legacies of the will thereby abate one half, and fall upon the half of the estate which passes by the will; and that there is error in the decree in not thus deciding, and it is therefore reversed, and the cause is now remanded to the orphans' court in order that the distribution may be made according to the principles now herein declared.

IMPLIED REVOCATION OF WILLS BY MARRIAGE AND BIRTH OF ISSUE.—This question has already been considered in the note to *Graves v. Sheldon*, 15 Am. Dec. 659, and our purpose now is simply to add further cases, together with the statutes on the subject.

MARRIAGE OF WOMAN.—The marriage of a woman, under the early law, revoked her will: 1 Jarman on Wills, *122; *Forse & Hembling's Case*, 4 Co. 61; *Hodsdon v. Lloyd*, 2 Bro. C. C. 534; *Doe ex dem. Hodsdon v. Staple*, 2 T. R. 684, 695; *Long v. Aldred*, 3 Addis. 48; and her will was not revived by the death of her husband: *Long v. Aldred*, *supra*. By statute, also, in the following states, the will of an unmarried woman is revoked by her subsequent marriage: Alabama Code 1876, sec. 2283; Arkansas Dig. of Stats., c. 155, sec. 6496; California Civil Code, sec. 1300; Dakota Civil Code, sec. 709; Indiana R. S. 1881, sec. 2562; Missouri R. S., sec. 3965; Montana R. S. 1879, sec. 460; Nevada Gen. Stats. 1885, sec. 3009; New York, 3 R. S., 7th ed. 1882, by Banks.

p. 2286, sec. 44; Oregon Gen. Laws 1872, c. 64, sec. 7; Pennsylvania, 2 Brightly's Purdon's Dig. 1872, p. 1477, sec. 18, tit. Wills, and see post, this note; and in California, Dakota, Montana, Nevada, and Pennsylvania, it is specially provided that it shall not be revived by the death of her husband. In these states, of course, there can be no doubt on the subject: *Vail v. Lind- erty*, 67 Ind. 528. In Massachusetts, also, it is held that the subsequent marriage of a *feine sole* revokes her will: *Swan v. Hammond*, 138 Mass. 45; S. C., 52 Am. Rep. 255. And where the language of the statute is that the will of an unmarried woman shall be "deemed" revoked by her subsequent marriage, the language is positive and does not create a mere presumption in favor of revocation: *Lathrop v. Dunlop*, 4 Hun, 213; S. C., 6 Thomp. & C. 512, affirmed in 63 N. Y. 610. These statutes are not repealed by implication by subsequent acts conferring upon married women testamentary capacity, nor acts for the more effectual protection of their property, thus taking away the reasons of the common-law rule: *Brown v. Clark*, 77 Id. 369; *Lathrop v. Dunlop*, *supra*; *Loomis v. Loomis*, 51 Barb. 257; *Fransen's Will*, 26 Pa. St. 202. In certain states, however, it is held that the married women's property acts, and acts conferring testamentary capacity upon married women, have done away with the reasons of the common-law rule, and therefore wills of unmarried women are not revoked by their subsequent marriages: *Webb v. Jones*, 36 N. J. Eq. 163; *Fellows v. Allen*, 60 N. H. 439; S. C., 49 Am. Rep. 328; *Morton v. Onion*, 45 Vt. 145; *In re Carey's Estate*, 49 Id. 236, 246; S. C., 24 Am. Rep. 183; *In re Tuller*, 79 Ill. 99; S. C., 22 Am. Rep. 164. In Ohio her will is not revoked under the statute: R. S. 1880, sec. 5958.

MARRIAGE OF MAN.—The marriage of a man, however, did not revoke his will: 1 Jarman on Wills, sec. *123; *Doe ex dem. White v. Barford*, 4 Man. & Sel. 10; *Brush v. Wilkins*, 4 Johns. Ch. 506; *Wheeler v. Wheeler*, 1 R. L. 364. This rule of the early law is not changed in Indiana: *Bowers v. Bowers*, 53 Ind. 430. But in *Morgan v. Ireland*, 1 Idaho, N. S., 786, the court rejected the early authorities, and held that his will was revoked by his subsequent marriage. By statute now in many of the states, the will of a man, as well as of a woman, is revoked by a subsequent marriage: Georgia Code 1882, sec. 2477; Illinois Stats. 1885, c. 39, sec. 10; Kentucky Gen. Stats. 1883, c. 113, sec. 9; North Carolina Bat. Rev. 1873, c. 119, sec. 42; Rhode Island R. S., c. 182, sec. 6; Virginia Code 1873, c. 118, sec. 7; West Virginia Code 1884, c. 77, sec. 6; and this is so at present in England: 1 Vict., c. 26, sec. 18; unless, in Georgia, provision is made in contemplation of the event; but in Kentucky, North Carolina, Virginia, West Virginia, and in England, a will made in the exercise of a power of appointment is not revoked. See, as interpretations of these statutes, *Byrd v. Surles*, 77 N. C. 435; *Deupree v. Deupree*, 45 Ga. 415; *Phaup v. Wooldridge*, 14 Gratt. 332; *Tyler v. Tyler*, 19 Id. 151; *American Board of Comm'rs v. Nelson*, 72 Id. 564; *In re Tuller*, 79 Id. 99; S. C., 22 Am. Rep. 164; *Duryea v. Duryea*, 85 Ill. 41; *Wheeler v. Wheeler*, 1 R. L. 364; *Miller v. Phillips*, 9 Id. 143. In some states, the will of a testator who afterwards marries and leaves a widow is revoked, unless provision is made for her, or she is mentioned in such a way in the will as to show an intention not to make such provision: California Civil Code, sec. 1299; Dakota Civil Code, sec. 708; Montana R. S. 1879, sec. 459; Nevada Gen. Stats. 1885, sec. 3009; Washington Code 1881, sec. 1332; and see *Sanders v. Simcich*, 65 Cal. 50; S. C., 1 West Coast Rep. 868. In Delaware, the widow takes the same part of the testator's estate as she would have been entitled to if the testator had died intestate, if no provision has been made for her: Laws 1874, c. 84, sec. 23. The Pennsylvania and South Carolina

statutes also contain provisions for a partial or total revocation, respectively, in case a man marries and leaves a widow surviving him: 2 Brightly's Purdon's Dig. 1872, p. 1477, sec. 18, tit. Wills; Gen. Stats. S. C. 1882, sec. 1860; and see *Edwards's Appeal*, 47 Pa. St. 144; *Walker v. Hall*, 34 Id. 483.

MARRIAGE AND BIRTH OF CHILD.—As marriage alone did not revoke the will of a man at the early law, so the birth of a child after marriage was not of itself a revocation: 1 Jarman on Wills, *123; *Doe ex dem. White v. Barford*, 4 Man. & Sel. 10; *Brush v. Wilkins*, 4 Johns. Ch. 506. But marriage and birth conjointly revoked a man's will, whether of real or personal estate: 1 Jarman on Wills, *123; *Brown v. Thompson*, 1 Eq. Cas. Abr. 413, pl. 15; *Eyre v. Eyre*, 1 P. Wms. 304, note; *Christopher v. Christopher*, Dick. 445; *Brady v. Cubitt*, Dougl. 31; *Gibbons v. Caunt*, 4 Ves. 840, 848; *Lugg v. Lugg*, 2 Salk. 592; *Marston v. Roe ex dem. Fox*, 8 Ad. & El. 14; S. C., 2 Nev. & P. 504; *Kenebel v. Scrafton*, 2 East, 530; *Doe ex dem. Lancashire v. Lancashire*, 5 T. R. 49; *Hollway v. Clarke*, 1 Phillim, 339; *Matson v. Magrath*, 1 Rob. Ecc. 680; *Israell v. Rodon*, 2 Moo. P. C. 51; *Wilcox v. Rootes*, 1 Wash. (Va.) 140; *Sneed v. Ewing*, 5 J. J. Marsh. 460; S. C., 22 Am. Dec. 41, 53; *Brush v. Wilkins*, 4 Johns. Ch. 506; *Sherry v. Lozier*, 1 Bradf. 437; *Bloomer v. Bloomer*, 2 Id. 339, 345; *Heavens v. Van Den Burgh*, 1 Denio, 27; *Wheeler v. Wheeler*, 1 R. L. 364, 371. There is some conflict among these cases as to whether the will is absolutely revoked, as a rule of the law, or whether a presumption of revocation is raised which may be overcome. In *Sheath v. York*, 1 Ves. & B. 390, where a testator, who was a widower, gave all his real and personal estate in trust for his children, a son and two daughters, and afterwards married and had a daughter, the will is revoked as to the personal, but not as to the real, estate, since the daughter of the second marriage would derive no benefit from the revocation of the devises. Questions of this character are of course avoided in those states where the marriage itself of a man or woman revokes a prior will, and also in a number of states which have a special statute on the subject. Thus it is provided that a will disposing of the whole estate is revoked if the testator afterwards marry and leave his wife or issue of such marriage, unless provision shall have been made for such issue: Alabama Code 1876, sec. 2282; Arkansas Dig. 1884, c. 155, sec. 6495; California Civil Code, sec. 1298; Dakota Civil Code, sec. 708; Missouri R. S., sec. 3964; Montana R. S. 1879, sec. 458; New York, 3 R. S., 7th ed. by Banks, 1882, p. 2288, sec. 43; Oregon Gen. Laws 1872, c. 64, sec. 6; Pennsylvania, 2 Brightly's Purdon's Dig. 1872, p. 1477, sec. 18, tit. Wills; South Carolina Gen. Stats. 1882, sec. 1860; Washington Code, sec. 1325; or in such way mentioned therein as to show an intention not to make such provision: Alabama, California, Dakota, Montana; and see *Sanders v. Simcich*, 65 Cal. 50; S. C., 1 West Coast Rep. 868. In Pennsylvania, a subsequent marriage and birth of issue do not amount to a total revocation of a will, even where the subsequent issue is the testator's only child: *Coates v. Hughes*, 3 Binn. 498.

It has been stated above that the birth of child did not of itself revoke a will, under the early law. Under American statutes it may do so if the child was unprovided for, unless the omission was intentional: See *Wilson v. Foakes*, 39 Am. Dec. 736, and note thereto discussing the question. The following are additional cases under these statutes: *Hughes v. Hughes*, 37 Ind. 183; *Morse v. Morse*, 42 Id. 365; *McCullum v. McKenzie*, 26 Iowa, 510; *Carey v. Baughn*, 36 Id. 540, 542; S. C., 14 Am. Rep. 534; *Negus v. Negus*, 46 Iowa, 487; S. C., 26 Am. Rep. 157; *Fallon v. Chidester*, 46 Iowa, 588; S. C., 26 Am. Rep. 164; *Milburn v. Milburn*, 60 Iowa, 411; S. C., 14 N. W. Rep. 204; *Alden v. Johnson*, 63 Iowa, 124; *Warner v. Beach*, 4 Gray, 162; *Ash v. Ash*,

9 Ohio St. 383; *Evans v. Anderson*, 15 Id. 324; *Tomlinson v. Tomlinson*, 1 Ashm. 224; *McKnight v. Read*, 1 Whart. 213; *Walker v. Hall*, 34 Pa. St. 483; *Edwards's Appeal*, 47 Id. 144; *Hollingsworth's Appeal*, 51 Id. 518; *Willard's Estate*, 68 Id. 327; *Grosvenor v. Fogg*, 81 Id. 400; *Squire's Estate*, 11 Phila. 110; *Hart v. Hart*, 70 Ga. 764.

DAVIS v. FUNK.

[89 PENNSYLVANIA STATE, 243.]

TROVER WILL LIE FOR WRONGFUL CONVERSION OF PROMISSORY NOTE. *Per Thompson, J.*

PLEDGEE IS BOUND TO NOTIFY PLEDGOR OF INTENT TO SELL PLEDGE, after default in payment, and of the time and place of sale, in the absence of a contract to sell *ex mero motu*.

TROVER brought by Funk, as the administrator of one Richards, against Davis, for the conversion of a promissory note. The plaintiff had a verdict and judgment, and the defendant sued out a writ of error. The facts are stated in the opinion.

Gest and Cuyler, for the defendant in error.

By Court, THOMPSON, J. No question was made on the trial below as to the form of action, and there is nothing on the record to raise it now. That trover will lie for a wrongful conversion of bonds, bills, notes, stocks, title papers, and the like, has been too often determined by the courts to be now doubted: *Biddle v. Bayard*, 13 Pa. St. 150; *Pittsburgh and C. R. R. Co. v. Barker*, 29 Id. 160; *Lockwood v. Bull*, 1 Cow. 322 [13 Am. Dec. 539]; *Stearns v. Marsh*, 4 Denio, 227 [47 Am. Dec. 248].

The note, for the recovery of which this action was brought, was pledged by a broker with whom it had been left to be negotiated for a loan to himself, and on default of payment, it was sold for what it would bring—being less by some five hundred dollars than its face, which called for one thousand one hundred dollars. The plaintiff, the administrator of the original owner, having tendered the advance made by the pledgee, the defendant, to the pledgor, four hundred and ninety dollars, brought suit to recover the difference between that sum and the face of the note.

On the trial below, two points were made and discussed: first, could the pledgee, in the absence of a contract to sell, on default of payment, sell the security to pay the debt, and was such a contract implied in that sort of bailment? This point I understand the court to have affirmed, and to have put the

case on the next point, now to be stated, and that was, Could such a sale be made without notice to the pledgor of the time and place of the sale? This he held to be necessary, and this must, under the charge, have been the ground upon which the plaintiff got a verdict.

This being our understanding of the charge, we cannot discuss the first point, for it was with the plaintiff in error; and we leave it without the expression of any opinion in regard to the law of it, and proceed to dispose of the second question, which regards the duty imposed by law on the bailee of a pawn or pledge to give notice to the pledgor of an intent to sell, and of the time and place, without regard to the question of whether the pawnee of a chose in action may sell it or not, as may be done in case of merchantable commodities pledged or pawned. That point is not before us.

We are clearly of opinion that the learned judge of the district court was right in ruling that the pledgor was bound to give notice of an intent to sell after default of payment, and of the time and place of sale, in the absence of a contract to sell *ex mero motu*. The authorities seem uniform as to this. In *Stearns v. Marsh*, 4 Denio, 227 [47 Am. Dec. 248], Mr. Justice Jewett says: "As the law now is, the pledgee may file a bill in chancery for a foreclosure, and proceed to a judicial sale; or he may sell without judicial process, upon giving reasonable notice to the pledgor to redeem, and of the intended sale;" and to the same effect is 2 Kent's Com. 581-583; Story on Bailments, sec. 310; Story on Contracts, sec. 723; 2 Story's Eq. Jur., sec. 1008. So, also, is the case of *Lewis v. Graham*, 4 Abb. Pr. 106.

The cases of *Wilson v. Tucker*, 1 P. Wms. 261, and also reported in 1 Bro. P. C. 494, by the name of *Wilson v. Tooker, Administrator of Thynne*, and the case of *De Lisle v. Priestman*, 1 Bro. 176, cited as in conflict with the above principles, are not so, as has been well shown by Judge Stroud, in an able opinion in another aspect of this case, to be found in 7 Am. Law Reg. 483.

The rule is commended by every consideration of fair dealing. At best, the remedy is very summary, and operates against the property of needy creditors generally. It is but just, therefore, that an opportunity to redeem should be allowed to the last; or, if unable to accomplish that desirable end, that the debtor may have an opportunity to procure the attendance of bidders, to prevent the sacrifice of his property; or collu-

sive sales to interested parties. This assimilates the sales somewhat to a judicial sale, where public notice of time and place is always a prerequisite to its validity.

As we see no error in any part of the charge fairly before us, we must affirm the judgment.

Judgment affirmed.

TROVER WILL LIE FOR NOTE, CERTIFICATE OF STOCK, ETC.: *Conner v. Hillier*, 73 Am. Dec. 105, and note collecting prior cases; and see *Robbins v. Packard*, 76 Id. 134.

PLEDGE MAY FORECLOSE IN EQUITY, OR SELL ARTICLE PLEDGED without judicial process: *Stearns v. Marsh*, 47 Am. Dec. 248; *Lockett v. Townsend*, 49 Id. 723, and note; *Wilson v. Little*, 51 Id. 307, and note. He may sell, without judicial process, upon giving notice to the debtor to redeem: *Wheeler v. Perole*, 43 Wis. 338; but a notice of the time and place of sale, unless waived, is indispensable: *Cushman v. Hayes*, 46 Ill. 153; *Sitgreaves v. Farmers' and Mechanics' Bank*, 49 Pa. St. 464; the last three cases citing the principal case.

STEININGER v. HOCH'S EXECUTOR.

[39 PENNSYLVANIA STATE, 203.]

ONE WHO SIGNS INSTRUMENT IMPORTING OBLIGATION IS PRIMA FACIE BOUND BY IT, whether he signs at the right or the left hand of the paper, if there is no room for an inference that any other was intended to be the signer.

PRESUMPTION THAT ONE WHO SIGNS INSTRUMENT IMPORTING OBLIGATION IS BOUND BY IT DOES NOT EXIST, where the signature occupies an equivocal position; as that of a subscribing witness to an instrument under seal, prepared for and executed by but one person.

ONE WHO SIGNS INSTRUMENT IN PLACE FOR SUBSCRIBING WITNESS IS NOT PRIMA FACIE LIABLE as a co-promisor, because the word "witness" did not appear, where the instrument is in form the single bill of another, and is executed by him as such.

DEBT by Abraham Hoch, as executor of Samuel High, against George Steininger. The facts are sufficiently stated in the opinion.

Marx and Runk, and Elisha Forrest, for the plaintiff in error.

John D. Stiles, for the defendant in error.

By Court, THOMPSON, J. The plaintiff, in his representative capacity, sued the defendant as a co-promisor with Abraham Eshbach, on the following instrument:

"ALLENTOWN, March 29, 1856.

"One year after date, I promise to pay to the order of Samuel High, die sum von acht huntert daler, without defalcation, for value received, with lawful interest till paid.

"ABRAHAM ESHBACH. [SEAL.]

"GEORGE STEININGER."

The acknowledgment of the signature by the defendant having been testified to, the court admitted it in evidence under exception. This constitutes the first assignment of error.

The effect of this ruling was a determination that the instrument was *prima facie* the promissory note of the defendant; and as this and the eighth and tenth assignments, which are exceptions to the charge, present, in substance, but one question, they will be considered together.

Does this signature, considering the form of the instrument, its execution, and the position of the defendant's name on it, *prima facie* import an obligation, and to go to the jury on proof of the execution, as in ordinary cases?

It matters little where the signature of a party to a writing may be placed, if the instrument imports an obligation or an engagement, and is accordingly so signed. Whether it appear at the right or the left hand of the paper, the signer will be presumed to be bound by it, for there is no room for an inference that any other was intended to be the signer.

But this cannot be claimed where the signature occupies a position that is certainly equivocal. Still less so when the position is that of a subscribing witness, and another has executed the instrument prepared for the signature of but one person. That is our case.

The instrument is in form the single bill of Eshbach, and as such it was executed by him. At the other end of the paper stands the defendant's name. It was claimed, when offered in evidence, that inasmuch as the word "witness" did not appear to explain the purpose of the defendant's signature, that therefore its appearance on the paper was *prima facie* evidence that it was the promise of the defendant. It was only on this ground that the court could have admitted it on proof of the signature alone. The admission was not preceded by any other proof, but being followed by testimony which would have justified its admission, this error would have been cured, for the order of testimony is generally a matter for the court; but the doctrine that this execution was to be taken to be *prima facie* evidence that it was the promissory note of the defendant was a serious error, as will appear presently, and not cured by the oral evidence that it was intended to be so, which was afterwards given.

I do not doubt but there was evidence from which a jury might, if they believed it, have found that the instrument was the promissory note of the defendant. A note drawn in the

singular number, and signed by several, has often been held to be binding as the joint and several note of all: Byles on Bills, 67, note 1, and authorities there cited.

Nor do I doubt that a sealing by one, and a signature without a seal by another, might be the single bill of one and the promissory note of the other: *Biery v. Haines*, 5 Whart. 563. But then it must either appear to be so by the instrument, or, if equivocal, be made to appear so by proper proofs.

Prima facie it was not the several note of the defendant, for it was the perfect single bill of another. His signature did not go a step towards establishing that it was his promise. It was just where the name of the subscribing witness is usually to be found. It was an instrument under seal, which is usually executed in the presence of a subscribing witness, and in a form which *prima facie* excluded any legal inference of the kind assumed. Custom is law, and by it we are justified in inferring that an instrument drawn to be signed by one person, and signed at the right hand, is the signature of the promisor, and a signature on the left is the attestation. As it stood, the inference was against the paper being the note of the defendant, and required proof before its admission to overrule this legal inference. It is true, the plaintiff gave evidence to prove that it was intended to be the note of the defendant, by his own admissions and consent, at the time of signing. But if it was to be taken to be his note *prima facie* as it stood in his signature, it is plain that the jury might have found for the plaintiff, although the entire oral testimony might be discredited, or none given. This was the error: it was not the defendant's note unexplained, and there could not properly have been a recovery, without there was a preponderance of testimony to establish an intended liability by the defendant. The charge was, "that where a man puts his name at the bottom of a note, *prima facie* he is a party to it as a promisor. His responsibility does not depend upon whether his signature is a little more to the left than to the right."

This, while undoubtedly true where there is a consistency between the form and the signature, where there is but one name designed to be put to the instrument, is not true where the instrument is equivocal, or complete with one signature, and there is another, neither executed with equal solemnity with the first, nor in the place of a promisor, and to a paper speaking but for one person, and already executed by one. Under this general instruction, the jury may have given their

verdict without regard to what was essential to be established by proof, and for this reason the judgment must be reversed.

The other assignments of error are not sustained. It is true, the question allowed to be asked Anna High was not altogether unobjectionable on the ground assigned. Facts ought not to be assumed in an examination in chief, but as much latitude in the direction an examination is to take is allowed in all courts, we would not reverse on account of the permission to ask the question in the form in which it was put in this case. Doubtless all complaint will be avoided on another trial.

Decree reversed, and a *venire de novo* awarded.

THE PRINCIPAL CASE, as it again came before the court, is reported in *Steininger v. Hock's Ex'r*, 42 Pa. St. 432.

KEEN v. COLEMAN.

[89 PENNSYLVANIA STATE, 299.]

MARRIED WOMAN IS NOT ESTOPPED FROM SETTING UP COVERTURE to an action on her judgment bond, by the fact that she falsely represented herself as single at the time she gave it, and thereby obtained the consideration for which it was given.

ASSUMPSIT. The defendant, Mary Ann Coleman, who was a married woman, by falsely representing herself as a widow, induced the plaintiff to take her judgment bond and mortgage for certain promissory notes of one George Moore, on which the plaintiff was about to sue. Mrs. Coleman afterwards applied to the court for a rule to strike off the judgment, on the ground that she was a married woman. The court refused to do this, but directed an issue to determine whether she was a married woman or not at the time she executed the bond. The defendant had a verdict and judgment, whereupon the plaintiff sued out a writ of error. The question in the case, which arose on the charge to the jury, was, whether the defendant was estopped from setting up coverture.

William L. Hirst, F. C. Brewster, and Lucas Hirst, for the plaintiff in error.

By Court, LOWRIE, C. J. The defendant was a married woman when she gave this judgment bond, and the court below decided that it is not made good by the fact that she

represented herself to be single at the time she gave it, and thereby obtained the consideration for which it was given.

She may be liable to an action for the deceit practiced by her; but she had no legal power to execute this bond, and by it she cannot be legally bound. As in the case of infancy, it is not a question of privilege, but of legal incapacity to contract, that stands in the way of the plaintiff's recovery on this bond. The wrong done cannot make the contract good by way of estoppel, and the wrong itself will not always furnish a cause of action: *Stoolfoos v. Jenkins*, 12 Serg. & R. 403; *Curtin v. Patten*, 11 Id. 305; *Irwin v. Keen*, 3 Rawle, 351; *Wilt v. Welsh*, 6 Watts, 9. In England, the court refuses to set aside such a judgment as this in a summary way, where the woman had represented herself as single, though it is conceded that it would be set aside on writ of error: Clancy on Married Women, 81. The mode pursued here is a substitute for a writ of error, or *audita querela*. We do not see how there can be an estoppel involved in the very act to which the incapacity relates, that can take away that incapacity. If a legal incapacity can be removed by a fraudulent representation of capacity, then the legal incapacity would have only a moral bond or force, which is absurd.

Judgment affirmed.

MARRIED WOMEN, WHEN ESTOPPED: See *Bradley v. Snyder*, 58 Am. Dec. 564, and note; *Lowell v. Daniels*, 61 Id. 448, and note; *Morrison v. Wilson*, 73 Id. 593. A married woman is not estopped from setting up coverture to defeat a recovery on her bond, the consideration of which was obtained through her representations that she was a widow: *Klein v. Caldwell*, 91 Pa. St. 144. Legal incapacity cannot be removed by fraudulent representations, nor can there be an estoppel involved in the act to which the incapacity relates that can take away that incapacity: *In re Comstock*, 11 Nat. Bank. Reg. 181; both citing the principal case; but in the principal case the question was waived whether an action for deceit would lie: *Glidden v. Strupler*, 52 Pa. St. 406.

THE PRINCIPAL CASE IS CITED in *Sims v. Everhardt*, 102 U. S. 313, S. C. 1 Trans. Rep. 21, *Carpenter v. Carpenter*, 45 Ind. 145, to the point that an estoppel in pais is not applicable to infants, and a fraudulent representation of capacity is not equivalent to an actual capacity; and in *Hartman v. Osborn*, 54 Pa. St. 122, to the point that a married woman cannot encumber her separate estate for the benefit of another.

PLYMOUTH RAILROAD COMPANY v. COLWELL.

[89 PENNSYLVANIA STATE, 337.]

RAILROAD COMPANY'S LANDS ARE EXEMPT FROM LEVY AND SALE under judgments against it, when the lands are appropriated to corporate objects, and are necessary for the full enjoyment and exercise of any franchise of the company, whether the lands are acquired by purchase, or by the exercise of the power of eminent domain. Sequestration is the only remedy.

RAILROAD COMPANY'S LANDS, NOT ACTUALLY DEDICATED TO CORPORATE PURPOSES, are bound by lien of judgments against the company, and are liable to levy and sale thereunder, in the same manner and with the same effect as the lands of any other debtor.

CANAL BASIN, PURCHASED BY RAILROAD, IS SUBJECT TO LEVY AND SALE ON EXECUTION against the company, where the railroad has no authorized canal connection. It is not a legitimate incident of the railroad.

RAILROAD COMPANY CANNOT APPROPRIATE GROUND FOR ENGINE AND WATER STATIONS after the lapse of five years, where it is authorized by its charter to appropriate a strip of land of but a certain width, except in deep cuts and fillings, or at points selected for depots, or engine or water stations, and is given five years to complete a locomotive road, but only a horse road was constructed within that time.

EJECTMENT, brought May 12, 1858, by the Plymouth Railroad Company against Stephen Colwell and Susanna Jacoby, in which the defendants had a verdict and judgment. The facts are stated in the opinion.

D. H. Mulvany, for the plaintiffs in error.

H. McMiller and James Boyd, for the defendants in error.

By Court, WOODWARD, J. It was demonstrated on the argument, from the descriptions in title papers and from a draught of the premises, that the land for which Colwell took defense was not within the description of the plaintiff's writ. Of course they were not entitled to recover that for which they had not sued, and the verdict and judgment as to Colwell are unimpeachable.

But the defense of Mrs. Jacoby, as to her part of the premises, rests on another footing. To explicate it clearly from the confusion of an ill-arranged paper-book, the leading facts of the case must be grouped together.

By an act of assembly of the eighteenth of March, 1836, the plaintiffs were incorporated as a railroad company, to build a railroad apparently for the purpose of connecting the limekilns and farms of the interior of Montgomery county with the Philadelphia, Germantown, and Norristown railroad. In April, 1837, they bought a farm of Aaron Lukens, of forty

acres and one hundred and four perches, through which their road was to pass. They built a cheap railroad three and three fourths miles long, suitable only for horse-power, and have maintained it as such ever since. In 1841, they sold off to John Freedly and others thirty-eight acres and one hundred and thirty perches of the Lukens farm, retaining only one acre and one hundred and thirty-four perches—the premises now in dispute. In 1844, this retained lot was sold at sheriff's sale, on a judgment of Joseph Leedom against the company, the sale was set aside, and it was sold again on the same judgment to John Freedly, for nine hundred and fifty dollars. The last levy and sale described the premises as "two acres, more or less, on a part of which is the Plymouth basin, and the Plymouth railroad passes across said lot, subject to the corporate franchises of the said Plymouth Railroad Company over a part of said lot, if any they have." Exceptions were filed to said sale on behalf of the company, on the ground that the premises were expressly reserved to the company for railroad purposes, and that they included the basin and grounds on which the road is located, and which are indispensable appurtenants of the road. The court overruled the exceptions and confirmed the sale. On the twenty-sixth of November, 1849, Freedly conveyed part of the premises to Colwell, and after Freedly's death, his executors, in 1853, conveyed the residue to Susanna Jacoby. The company claim the basin as a means of communicating with the Schuylkill canal. It would seem there was a basin on the Lukens farm before the company bought, and that it was used as a deposit for logs to supply an adjacent saw-mill. After their purchase, the company deepened the basin so as to accommodate canal-boats, which were brought in there to receive from the railroad lime and other freights to be carried away by the Schuylkill canal. The company insist on their right to retain the basin for this purpose, and they claim the rest of the ground for the tracks of their road, for depots, engine-houses, etc.

What was the effect of the sheriff's sale on the company's title? They had very express authority by the incorporating law to buy, hold, mortgage, and sell lands; and in locating their road they probably found it expedient to buy the Lukens farm rather than pay damages for crossing it. This is often the true policy of railroad companies; but lands so bought and not actually dedicated to corporate purposes are bound by the lien of judgments, and are liable to be levied in execution, and sold by the sheriff in the same manner and with the

same effect as the lands of any other debtor. As to land which has been appropriated to corporate objects, and is necessary for the full enjoyment and exercise of any franchise of the company, whether acquired by purchase or by exercise of the delegated power of eminent domain, the company hold it entirely exempt from levy and sale; and this on no ground of prerogative or corporate immunity, for the company can no more alien or transfer such land by their own act than can a creditor by legal process; but the exemption rests on the public interests involved in the corporation. Though the corporation in respect to its capital is private, yet it was created to accomplish objects in which the public have a direct interest, and its authority to hold lands was conferred that these objects might be worked out. They shall not be balked, therefore, by either the act of the company itself or of its creditors. For the sake of the public, whatever is essential to the corporate functions shall be retained by the corporation. The only remedy which the law allows to creditors against property so held is sequestration: *Susquehanna C. Co. v. Bonham*, 9 Watts & S. 28 [42 Am. Dec. 315]. And that remedy is consistent with corporate existence, whilst a power to alien, or liability to levy and sale on execution, would hang the existence of the corporation on the caprices of the managers or on the mercy of its creditors. For the corporation would cease to exist for the purposes of its institution, when its means of subsistence were gone. It might still have a name to live, but it would be only a life in name. A railroad company could scarcely accomplish the end of its being, after the ground on which its rails rest had been sold to a stranger. If such is in general the law of corporate tenures which are essential to corporate functions, it is peculiarly the law of this case where Freedly took his title from the sheriff, expressly subject to the franchises of the Plymouth Railroad Company.

Then what are the franchises of this company? Do they include a right to the basin for purposes of navigation?

The company were authorized to build a railroad, with as many sets of tracks as they may deem necessary, from a point in the lands of Samuel Maulsby, in the township of Whitemarsh, in the county of Montgomery, near the road dividing the townships of Whitemarsh and Plymouth, east of said road, "and terminating at some suitable point of the Philadelphia, Germantown, and Norristown railroad, between Metser's ford and Wager's ford, on the river Schuylkill, in said township of Plymouth."

The reference to the river Schuylkill, and the fords thereof, was for the purpose of fixing, with approximate certainty, the point *ad quem* the railroad was to be built; but its actual terminus was to be on the Philadelphia and Norristown railroad. A connection with that road was intended, but not with the Schuylkill canal. The improvement contemplated was a transportation by connecting railroads, and not by a railroad and canal. There is not a word in the law of incorporation which imports an intention to create a navigation company. Then what has the company to do with canal basins and canal-boats? It is not pertinent to urge that their road would be more profitably worked in connection with the canal than with the railroad. Their corporate powers are to be measured by a strict construction of the legislative grant. If they possess the right claimed, it must be found in the powers specifically granted, or it must result as a necessary implication from the express grants; and if it can neither be found in nor inferred from the terms of the grant, it does not exist. Authority granted to terminate a road on the Philadelphia and Norristown railroad cannot be construed an authority to terminate it in the Schuylkill canal. And it follows, as a necessary consequence, that a canal basin is not a legitimate incident of a railroad having no authorized canal connection. Neither, therefore, under the general principles of law, nor the particular qualification expressed in the sheriff's deed to Freedly, was this basin held as an appurtenant of the railroad, and hence a valid title passed by the sheriff's sale to Freedly, and through him to Mrs. Jacoby.

But the whole lot was sold, and included the very bed of the road, as well as the ground that was needed for a depot and other buildings. As to such portions of the lot as were occupied or appropriated for these purposes, no title passed to Freedly, and none, of course, vested in Mrs. Jacoby. Yet, she having taken defense for the whole, the verdict ought to have distinguished what was lawfully appurtenant to the road, and what was not. The company must be protected in the possession of all that is really essential to the enjoyment of their franchise.

Their charter authorizes them to appropriate four rods in width, and limits them to that, except in deep cuts and fillings, or at points selected for depots, or engine or water stations. It evidently contemplated a locomotive road, and it gave them five years to complete it, "according to the true

intent and meaning of this act." In ascertaining the necessary appurtenances of the road, regard is to be had to this limitation of time, for the appropriations of ground were to be all made within that time. The road was to stand complete at the end of five years—not that all necessary tracks and buildings, which increasing business should require to be added to the first construction, should have been erected in that time, but that the ground for all such additions should have been appropriated, and one track at least finished.

If the fact be that a locomotive road has not yet been constructed, it is too late to appropriate ground for engine and water stations: that should have been done within the five years. And indeed, it would be hard for the company to maintain the track of a horse road under such a law as they have, if they were proceeded against by the commonwealth. But we will not allow them to be ousted from the ground they actually occupy by an intruder, with merely color of title; nor is a forfeiture of chartered privileges to be declared in this collateral action. They are entitled to retain and enjoy the ground they occupy, and which they appropriated for the lawful purposes of the road within five years from the date of the charter. But no alleged appropriation for engine-houses and water-stations ought to be respected, if it was followed by no *bona fide* effort to build a locomotive road, according to the plain intent of the charter. Without such a road, an appropriation of that sort would be useless, if not fraudulent.

These seem to us to be the principles on which this cause ought to have been decided. Most of them were observed by the learned judge in his rulings; but what portion of the ground had become appurtenant to the road by appropriation such as we have described was a question of fact which ought to have been submitted to the jury. And there was some evidence on the point in the admitted portions of Carson's depositions. If there ever was any appropriation made by stakes or fences, or other acts on the ground, the company ought to be able to show it by the most irrefragable proof.

The assignments of error, founded on bills of exception to evidence, were apparently made in studious disregard of the rules prescribed in 18 Pa. St. 578, especially rule 8; but still, we have gone through them as well as we could, and neither in them nor in the answers to the points propounded do we see any other ground for reversing the judgment than the failure to submit to the jury the question how much of the ground

in dispute the company had actually appropriated to the lawful purposes of their corporation.

The judgment is reversed, and a *venire facias de novo* is awarded as to Susanna Jacoby, and judgment affirmed as to Stephen Colwell.

RAILROAD COMPANY'S PROPERTY, WHETHER MAY BE SOLD UNDER JUDICIAL PROCESS: See note to *Coe v. Columbus etc. R. R.*, 75 Am. Dec. 550. And see *Susquehanna Canal Co. v. Bonham*, 42 Id. 315. The land of a railroad company cannot be levied upon by a creditor: *Talcott v. Township of Pine Grove*, 1 Flipp. 146; and the easement or right of passage of a railroad over land is not the subject of a lien or sale under execution: *Western Pennsylvania R. R. v. Johnston*, 59 Pa. St. 294. A corporation, being established by law, and existing in legal contemplation for the public benefit, can only be put out of existence, or stripped of what is essential to its existence, by public authority, and not by private suitors: *Oakland R'y v. Keenan*, 56 Id. 203; and see *Cleveland etc. R. R. v. Spear*, Id. 384. The principal case is cited to the foregoing points.

BACKUS v. MURPHY.

[89 PENNSYLVANIA STATE, 397.]

EQUITY OF PARTNERSHIP CREDITORS TO HAVE PARTNERSHIP PROPERTY APPLIED TO FIRM DEBTS is to be worked out through the partners.

PARTNER MAY APPLY OR COMPEL APPLICATION OF PARTNERSHIP PROPERTY TO FIRM DEBTS while any partnership property remains; and, it would seem, if he is backward, firm creditors may compel him to allow them to use his name for this purpose.

EQUITY OF PARTNERSHIP CREDITORS TO HAVE PARTNERSHIP PROPERTY APPLIED TO FIRM DEBTS IS EXTINGUISHED by a sale of the property on execution against an individual partner, the effect of which is to exhaust the firm assets and dissolve the partnership.

ASSUMPSIT. Murphy, Benedict, & Co. held a judgment by confession against C. K. Sartwell & Bro., dated July 28, 1856, on which execution was issued March 1, 1860. Corwin & McCoy, on March 3, 1860, recovered judgment against John C. Backus & Co., and execution was issued thereon March 5, 1860. George W. Sartwell was a member of both firms. The property sold under these executions belonged to John C. Backus & Co. There was no dispute as to the payment of the execution in favor of Corwin & McCoy, but enough of the balance of the proceeds of the property sold to satisfy their writ was claimed by Murphy, Benedict, & Co. Subsequently, upon the application of John C. Backus and the creditors of the firm of John C. Backus & Co., alleging the insolvency of the firm, the court of common pleas directed an issue, in *assumpsit*, be-

tween John C. Backus and Murphy, Benedict, & Co., to try the right to so much of the funds raised on the sale under the executions as was claimed by Murphy, Benedict, & Co. upon their judgment. The foregoing facts were proved on the trial. The defendants had a verdict under the direction of the court, and an appropriation of so much of the money made by the sale as was necessary to satisfy their debt, interest, and costs was ordered. Backus thereupon appealed.

L. D. Wetmore, for the appellant.

R. Brown, for the appellees.

By Court, WOODWARD, J. The principles of the partnership relation and the effect of judicial sales of partnership effects, at the suit both of partnership creditors and of creditors of individual members of the firm, have been so frequently and fully discussed of late years in this court that it would be a waste of time to restate them, and I content myself by referring to the cases which illustrate them: *Doner v. Stauffer*, 1 Penr. & W. 205 [21 Am. Dec. 370]; *Roop v. Rogers*, 5 Watts, 193; *King's Appeal*, 9 Pa. St. 124; *Deal v. Bogue*, 20 Id. 228 [57 Am. Dec. 702]; *Baker's Appeal*, 21 Id. 82 [59 Am. Dec. 752]; *Coover's Appeal*, 29 Id. 11 [70 Am. Dec. 149].

It is not difficult to apply the doctrines of the foregoing cases to the facts of this case. The equity of the partnership creditors to have the partnership property applied to partnership debts was to be worked out through the partners. That is to say, whilst any partnership property remained, either partner might apply it or compel its application to the firm debts, and for this purpose might avail himself of the equity powers of the courts. And possibly creditors might compel him to allow them to use his name for this purpose, if he were backward in protecting their rights; but when, as here, neither he nor they interposed to arrest proceedings at law, the effect of which was to dissolve the partnership and to extinguish the joint stock, their right to intervene in the distribution of a sheriff's sale was gone. The money was applicable, first, to the execution of the joint creditors, and then to that of Murphy, Benedict, & Co., against Sartwell. The sales on these executions dissolved the partnership and exhausted the assets. The equities of the partners and of their creditors were extinguished by the sales, and are not to be revived for the purpose of being asserted now.

The judgment is affirmed.

EQUITY OF PARTNERSHIP CREDITORS TO HAVE PARTNERSHIP PROPERTY APPLIED TO FIRM DEBTS is to be worked out through the partners: *Baker's Appeal*, 59 Am. Dec. 752, and note collecting prior cases; *Miller v. Estill*, 67 Id. 305; *Tillinghast v. Champlin*, Id. 510; *Coover's Appeal*, 70 Id. 149.

EQUITY OF PARTNER TO INSIST UPON APPLICATION OF PARTNERSHIP CLAIMS IS WAIVED OR GONE upon a sale or transfer of his interest in the partnership, either voluntarily or upon execution: *Baker's Appeal*, 59 Am. Dec. 752, and note; *Coover's Appeal*, 70 Id. 149.

PARTNERSHIP PROPERTY IS PRIMARILY SUBJECT TO FIRM DEBTS: *Deal v. Bogus*, 57 Am. Dec. 702, and note; *Baker's Appeal*, 59 Id. 752, and note; *Cummings's Appeal*, 64 Id. 695; *Miller v. Estill*, 67 Id. 305, and note; *Coover's Appeal*, 70 Id. 149; *Scudder v. Delashmut*, 71 Id. 428; *Conroy v. Woods*, 73 Id. 605; *Hubbard v. Curtis*, 74 Id. 283; *Gaut v. Reed*, 76 Id. 94; *Erwin's Appeal*, post, p. 542; and compare *Tillinghast v. Champlin*, 67 Id. 510; and individual property to individual creditors: *Price v. Outie*, 74 Id. 52; *Hubbard v. Curtis*, Id. 283; compare *Gadsden v. Carson*, 70 Id. 207; *Loving v. Pairo*, 77 Id. 108. The principal case is cited in *Vandike's Appeal*, 57 Pa. St. 12, to the point that when partnership property is sold under separate executions against the partners individually, the proceeds represent the several interests of the partners, and not that of the partnership, and should be appropriated accordingly.

CRITCHFIELD v. HUMBERT.

[29 PENNSYLVANIA STATE, 427.]

TENANT IN COMMON MAY MAINTAIN TRESPASS AGAINST CO-TENANT FOR MESNE PROFITS, after a recovery in ejectment.

TENANT IN COMMON IS ENTITLED TO DAMAGES FOR USE AND OCCUPATION BY CO-TENANT, from the time he became the owner, where he recovers the land in ejectment, and then brings an action for mesne profits.

TRESPASS vi et armis. The facts are stated in the opinion.

Hugus and Kimmel, for the plaintiff in error.

Forward and Gaither, for the defendant in error.

By Court, **WOODWARD, J.** That a tenant in common may maintain trespass against a co-tenant for mesne profits, after a recovery in ejectment, is shown by the authorities referred to in *Bennet v. Bullock*, 35 Pa. St. 364, to which may be added the case of *Hare v. Fury*, 3 Yeates, 13 [2 Am. Dec. 358]. This action is of that sort. Critchfield, the plaintiff, purchased five undivided sixth parts of a tract of lumber land on the twelfth of February, 1858. Humbert, the owner of the other sixth, was in possession, and had cut down a considerable quantity of timber trees, for the manufacture of lumber at a saw-mill on the premises. Critchfield instituted ejectment against Humbert, and recovered a judgment on the ninth of September, 1859.

He then brought this action for mesne profits, but the court directed a verdict for the defendant, on the ground, apparently, that the evidence failed to prove any cutting of timber trees subsequently to the date of Critchfield's purchase. If that was the court's reason (we are obliged to speak subjun-ctively, for no reason is assigned of record), it was a reason that affected the measure of damages rather than the right of action. Critchfield could not recover for trees severed from the freehold before he became an owner, but he would be en-titled to damages for use and occupation by the defendant from the time that his, Critchfield's, title vested. Even if the damages were slight which he was entitled to recover, they would carry costs, and therefore he has a right to demand a reversal of the judgment, which put him out of court with nothing.

If the ruling were founded on doubts of the plaintiff's right to maintain an action of trespass, the authorities referred to will dissipate them. It is believed that in two cases a tenant in common may have trespass against his co-tenant: 1. For mesne profits; 2. For a total destruction of the common prop-erty.

The judgment is reversed, and a *venire facias de novo* is awarded.

LIABILITY OF TENANT IN COMMON TO CO-TENANT FOR SHARE OF PROFITS: See *Shepard v. Richards*, 61 Am. Dec. 473, and note collecting prior cases; *Moses v. Ross*, 66 Id. 250; *Peck v. Carpenter*, Id. 477; *Huff v. McDonald*, 68 Id. 487; *Isard v. Bodine*, 69 Id. 595; *Early v. Friend*, 78 Id. 649, and note.

MYER v. FEGALY.

[39 PENNSYLVANIA STATE, 422.]

JUDGMENT AGAINST "JOHN BOBB" IS LIEN ON LANDS OF "JOHN BUBB," both forms being the same same in sound, according to the pronunciation prevailing.

SCIRE FACIAS, to revive a judgment in the name of John Fegaly, for the use of E. Shober, against "John Bobb," with notice to Michael Myer, terre-tenant. The question in the case was whether a judgment against "John Bobb" was a lien on certain real estate conveyed to Myer by "John Bubb" and wife. The court of common pleas held that judgment to be a lien, whereupon the defendant sued a writ of error.

Newton Lightner, for the plaintiff in error.

J. B. Amoske and George W. McElroy, for the defendant in error.

By Court, LOWRIE, C. J. Courts cannot administer justice properly by a strict adherence to general customs, and by overlooking the modifications or limitations of them by special and local customs. Even the language of a people, usually the most universal of its customs, is subject to local differences, which must be respected in the ascertainment of rights. The language spoken in some of the old German parts of this state is a special custom of this sort. It is neither correct German nor correct English; and yet it is the means of verbal intercourse among a very large portion of our people. It has a *norma loquendi* of its own, and is not to be tested by the rules of either good German or good English. In its vowel and in its consonant sounds it differs from both; and of course this difference shows itself in the spelling of the names of persons.

Bubb is the name here, as the party owning it spells it; but in the judgment docket it is, in this case, written Bobb. According to our German mode of pronunciation prevailing in Lancaster county, the sounds of both forms are identical; and the latter form of spelling is doubtless the most usual in analogous cases; as in that of Pott, pronounced Putt, and as in other instances given by the learned judge of the common pleas. We cannot disregard such anomalies without doing great injustice; and people having relations with them, in the localities where they prevail, are bound to take notice of them. Persons searching the judgment docket for liens ought to know the different forms in which the same name may be spelled, and to make their searches accordingly; unless, indeed, where a spelling is so entirely unusual that persons cannot be expected to think of it.

It may be well to notice, however, that since, in modern days the surname has become the principal name, instead of the christian name, and since surnames have become comparatively well settled, we could hardly allow the same variety in spelling these as was allowed in more ancient times, when Sanders, Sanderson, Allison, and Ellison might have all been treated as one name, Alexanderson. After the learned discussion of the subject by the judge of the common pleas, in

his opinion, it seems to us these remarks are sufficient for the case.

Judgment affirmed.

THE PRINCIPAL CASE IS FOLLOWED in *Bergman's Appeal*, 88 Pa. St. 123, in holding that in the distribution of the proceeds of a sheriff's sale of the real estate of "Henry Hackman," a judgment entered against him in the name of "Henry Heckman" was properly allowed to participate therein, as against subsequent liens correctly entered; and also in *Jenny v. Zehnder*, 101 Id. 298, a case in which a judgment against "Fr. Zehnder," was entered in the name of "F. Zehnter."

EBERHART'S APPEAL.

[89 PENNSYLVANIA STATE, 509.]

TERRE-TENANT IS NOT "DEFENDANT" OR "DEBTOR," WITHIN MEANING OF EXEMPTION LAW which uses those terms.

RIGHT OF EXEMPTION IS PERSONAL, and is not vendible or assignable.

APPEAL from a decree distributing the proceeds on a sheriff's sale of the appellant's real estate. The facts are stated in the opinion.

E. H. Weiser, for the appellant.

Evans and Mayer, for the appellee.

By Court, WOODWARD, J. The fund for distribution arose from a sheriff's sale of land, of which Henry Stouffer was the owner, on the first day of April, 1858. It was incumbered by several judgments against him, among others that of Jacob Herman, executor of Emanuel Herman; and subject to the lien of these judgments, Stouffer conveyed the land to the appellant, Henry Eberhart, on the first day of April, 1851. After that, Herman's executor issued a *sci. fa.* on his judgment against Stouffer, with notice to the terre-tenant, obtained judgment thereon, took a *fi. fa.*, levied it on the land Stouffer had conveyed to Eberhart, had it condemned and sold by the sheriff to produce the fund in court. Eberhart gave due notice that he claimed the benefit of the exemption law of April 9, 1847, and when distribution came to be made, claimed to take three hundred dollars of the proceeds out of court in satisfaction of that claim. The court decided against him, and he thereupon appeals to us.

The person who is entitled to the benefit of the exemption law of 1849 is described or referred to in the act by two words—"defendant" and "debtor." The question, therefore, is,

whether a terre-tenant is a defendant or debtor, within the meaning of the act. That he is not a debtor is very plain, for reasons similar to those in *Rosenberger v. Hallowell*, 85 Pa. St. 372. He comes into possession of the land under the debtor without any contract with or consent of the creditor. Though he takes the land subject to the lien, it is not enforced against him by virtue of any contract with the creditor. It is not, indeed, enforced against him at all, but only against the land which he accepted with the incumbrance upon it. If the creditor lost his lien upon the land, or failed to get his money from a sale of it, he could have no recourse to other property, either real or personal, of the terre-tenant. This, it strikes me, is decisive against the supposed relationship of debtor and creditor, for wherever that relation exists, the debtor's whole estate, saving only such partial exemptions as statutes prescribe, is liable to answer for the debt. If not debtor, is he defendant? The legislature used both words in their ordinary sense, and both would be applicable to Stouffer, but neither of them, we think, to Eberhart. A terre-tenant is one in whom the title to the incumbered estate has vested. By the act of March 26, 1827, he is to have notice of any revival of a judgment which is intended to continue a lien upon land purchased by him of the debtor in the judgment, but he is spoken of throughout that act as terre-tenant, and not as either defendant or debtor. A revival, whether by *scire facias*, or by amicable agreement, that does not embrace him does not affect his estate, but a revival that does embrace him has no other effect than to estop him from questioning the creditor's lien afterward. It does not make him a defendant in the judgment any more than it makes him the debtor of the plaintiff. Even where, as in *Sames's Appeal*, 26 Pa. St. 184, an amicable revival between the plaintiff and terre-tenant was made without joining the defendant, we held the terre-tenant bound only as terre-tenant, and not in character of defendant. Under the revived judgment, the creditor could have seized no property of the terre-tenant, except the land purchased with the lien upon it.

If we look at other words of the exemption law, they will be found as unfavorable to the appellant as the descriptive terms already adverted to. Certain specific chattels are enumerated as exempt from "levy and sale," and beyond these the property intended to be exempted is not otherwise described than as that which is "owned by or in possession of the debtor."

By Court, STRONG, J. This was an action for money had and received, in which the plaintiff relied exclusively upon the common count in *indebitatus assumpsit*. The case, as exhibited by the evidence, was, that a certain John Keller had been appointed committee of a lunatic, and that the plaintiff had become surety in his bond. The lunatic was entitled to a sum of money from the executor of a will proved in the state of Ohio. In 1846, the plaintiff became uneasy respecting his suretyship, and it was then agreed between him, John Keller, the committee, and Jacob Keller, the defendant, that John should give to the defendant the power of attorney to collect the money due in Ohio, and that the defendant should retain it till the plaintiff should be released from his suretyship. The contract, as stated by the only witness who testified on the subject, was as follows: "That Jacob should go to Ohio, receive the money, and retain it until Samuel Rhoads gave John Keller an order to draw it. In the mean time, while Jacob was in the west, John was to endeavor to release Rhoads from the bond." In pursuance of this arrangement, the defendant, on the ninth of February, 1846, collected the money due in Ohio, amounting to four hundred and five dollars and ninety-five cents, but instead of retaining it, paid it over to John Keller, the committee, in June of the same year. The plaintiff was not discharged from his suretyship. In April, 1858, a report of an auditor upon the account of the committee of the lunatic was filed and confirmed, showing a balance in his hands of five hundred and twenty-three dollars and thirteen cents, and suit was then brought upon his bond. Before judgment was recovered, the present suit was brought against Jacob Keller to recover the money which he had collected in Ohio in 1846, under the power of attorney given to him by the committee of the lunatic. On the trial in the court below, several points were propounded to the court, and the errors assigned here are to the answers which were given.

In answer to the third, fifth, and sixth points of the defendant, the court instructed the jury that the action, being for money had and received, might be sustained by the plaintiff, and that the facts showed a sufficient consideration for the promise of the defendant. If the statute of limitations was not a bar to the recovery, the points were rightly answered. It cannot be questioned that a promise by a principal to indemnify his surety has sufficient consideration upon which to rest in the relation of the parties. Even before the surety has

been damnified, there is a moral obligation incumbent on the principal to protect him—an obligation which ripens into an implied legal one, so soon as the surety has paid on behalf of the principal. It springs out of the contract of suretyship. If, therefore, a principal deposit funds with a bailee for the protection of a surety, his act is not done without consideration, and the receipt of the funds is in itself a consideration for a promise by the bailee to pay to the surety. In the case now in hand, it cannot be objected that the consideration did not move from the plaintiff, for it was indirectly through his agency that the money came to the hands of the defendant. And even if it were not so, the defendant has received money deposited with him by the principal for the use of the plaintiff. It is indubitably settled, that if one pay money to another for the use of a third person, or, having money belonging to another, agree with that other to pay it to a third, action lies by the person beneficially interested: *Blymire v. Boistle*, 6 Watts, 182 [31 Am. Dec. 458]. It is of no importance to inquire whether the plaintiff could have prevented the receipt of the money by the committee of the lunatic. Let it be admitted that he could not, it is still a fact established by the verdict of the jury that John Keller caused to be placed in the defendant's hands a sum of money to indemnify the surety. For so doing, John Keller had received a consideration. The defendant then became the bailee of the plaintiff, and not the mere agent of John Keller, and in consideration of his receipt of the money he agreed to hold it for the use and subject to the order of the plaintiff.

Was, then, the statute of limitations a defense? The court instructed the jury that it was not, and of this the plaintiff in error complains. If the statute was not applicable to the claim of the plaintiff, it is not because the defendant was a trustee in any such sense as to be beyond its protection. In a certain sense he was a trustee, but the trust was not one enforceable only in equity. The plaintiff has himself resorted to a court of law. Those trusts only are without the operation of the statute which are exclusively cognizable in a court of equity: *Kane v. Bloodgood*, 7 Johns. Ch. 110 [11 Am. Dec. 417]; *Zacharias v. Zacharias*, 23 Pa. St. 455. But even in a court of law the statute does not begin to run until a plaintiff's right of action has accrued. Now, in this case, if the money had been deposited with the defendant, to be paid over unconditionally and immediately to the plaintiff, the right of action would

have accrued on the ninth of February, 1846, when it was received. But such was not the contract. The money was to remain with the defendant. The agreement contemplated his retaining it in custody until the plaintiff should be discharged from his liability, or until he should be damnified. Until the liability of the plaintiff was fixed, he could not have sued the defendant; and that liability was not fixed until 1858, when the account of the committee was settled. Our only doubt upon this subject arises from the fact that the declaration is not founded upon the special contract, but upon a general *indebitatus assumpsit*. Were we, however, to reverse upon this ground, the declaration would be amendable, and the statute would then be clearly no protection. Even as it is, the special contract shows that the use in favor of the plaintiff arose only when the plaintiff's liability was fixed only within six years.

The conditional verdict, it must be admitted, was a novelty, founded upon such a declaration; but it is a novelty of which the defendant cannot complain. It inures to his benefit, rather than to his injury.

The judgment is affirmed.

THE PRINCIPAL CASE IS CITED in *McCandless's Estate*, 61 Pa. St. 11, to the point that to exempt a trust from the operation of the statute of limitations, it must be directly and exclusively cognizable in a court of equity, and the question must arise between the trustee and cestui que trust.

ERWIN'S APPEAL.

[29 PENNSYLVANIA STATE, 535.]

LAND PURCHASED AND HELD FOR PARTNERSHIP PURPOSES IS PARTNERSHIP PROPERTY, although not necessary for the purposes of the firm; and judgments against the firm for partnership debts are payable out of its proceeds, in preference to judgments against the partners for individual debts.

APPEAL by Peter Erwin from a decree distributing the proceeds of the sheriff's sale of real estate of the firm of Imhoff & Myers. The facts are sufficiently stated in the opinion.

E. H. Weiser, for the appellant.

Evans and Mayer, for the appellee.

By Court, STRONG, J. The fund for distribution arises out of the sale of a lot, the legal title of which was in Jacob Myers, one of the partners in the firm of Imhoff & Myers. It

was purchased and paid for with the money of the firm, and it was used by the firm until the time of the sheriff's sale. The auditor has found, however, that it was "not necessary for the partnership purposes," and therefore, relying upon *Coder v. Huling*, 27 Pa. St. 84, he has distributed one half of the proceeds of the sale to a judgment creditor of Imhoff in preference to junior judgment creditors of the firm. His distribution was confirmed by the court, and hence this appeal. We think *Coder v. Huling*, *supra*, was misunderstood. That case and the present are very unlike. There as here, indeed, one partner purchased and took the deed in his own name, and paid for the land with the partnership funds; but the purchase was not only not necessary for the business of the partnership, but entirely disconnected from it. The business of the firm was storekeeping, the purchase was for the erection of saw-mills and lumbering operations. The purposes of the investment were therefore entirely foreign to the particular business in which the firm was engaged. But here, though the auditor reported that the land was not necessary for partnership purposes, he has not found that it was bought with views and purposes beyond and outside of the particular business in which the firm was engaged; and the evidence abundantly shows that the purchase was made to facilitate and render more convenient that business. The firm was engaged in distilling, and the lot adjoined their distillery. It was bought for an inclosure for the hogs to be fed at the distillery. Owing to a cause not foreseen, it was not used for that purpose; but if the beneficial interest was vested in the firm by the purchase, the subsequent use, different from what was originally contemplated, would not divest it. The altered uses were still for the firm. It was farmed at the expense of the firm, its profits went into the firm, and it was in all respects treated as partnership property. There was nothing, then, either in the views with which the lot was bought, or in its subsequent use, to take the purchase out of the rule that the beneficial interest in land follows the ownership of the money which was paid for it. Had the title been taken to both Imhoff and Myers, without any assertion on its face that it was treated by them as partnership property, under the ruling in *Hale v. Henris*, 2 Watts, 143 [27 Am. Dec. 289], and several subsequent cases, they would have been but tenants in common. The absence of such an assertion would have been evidential that the partners did not intend to bring the property into

partnership stock, but that they intended to take separate interests. But the legal title was conveyed to Jacob Myers alone. We are now looking for the use. With the intention to buy for the firm, with nothing to indicate a severance of interests, and with the fact that the joint funds paid for the lot, it must be that the beneficial interest was in the firm as such.

Upon what ground, then, was the judgment of Ditmars against Imhoff a lien? He could only have sold the interest of Imhoff in the firm, and that was personal, not subject to a lien. The title papers exhibited no interest in his debtor. At most, he had a mere equity, and that subservient to the right of the copartner, that the firm property, in whatever shape it might be, should be applied first to the payment of the partnership debts. In *Overholt's Appeal*, 12 Pa. St. 222 [51 Am. Dec. 598], it was held that where real estate has been purchased for partnership purposes, and has been so held, judgments against the firm for partnership debts are payable out of the proceeds of a sheriff's sale, in preference to judgments against the partners individually.

The appellee suggests a doubt whether, if Myers held the property in trust for the firm, and not the partners individually, it would help the appellant, because the judgments against the firm were confessed, as he alleges, by Myers alone. This does not appear on the record as exhibited to us; but assuming that such is the fact, it is not for Ditmars to object to them, or to claim that they are not judgments against the firm. It is only a non-assenting partner that can call in question the validity of a judgment confessed by his copartner for a firm debt: *Grier v. Hood*, 25 Pa. St. 430. Such a judgment is not void. Under it the property of the partnership may be sold, and the proceeds be claimed by the creditor.

In considering this case, we are not to lose sight of the fact that it is not a controversy between the partners themselves, but between the creditors of the firm and a creditor of an individual partner.

Upon the whole, we think that the lot, having been bought with the money of the firm, and with views and purposes in furtherance of its business, must be regarded as partnership property. It is not enough to convert the partners into tenants in common that the lot was not necessary for partnership purposes. If it was acquired for such purposes with the joint funds, it became a part of the joint property, though the business could have been carried on without it.

The decree of the court of common pleas is reversed, and the money in court is ordered to be distributed, first, to the judgment of George W. Wantz, ninety-two dollars and ninety-two cents (this appropriation being made by the consent of the appellants), and the remainder is decreed, *pro rata*, to the judgments of Peter Erwin and John Fisher, and it is ordered that the costs in the court be paid by the appellee.

WOODWARD, J., dissented.

LANDS PURCHASED FOR PARTNERSHIP PURPOSES WITH PARTNERSHIP FUNDS IS PARTNERSHIP PROPERTY: *Buchan v. Sumner*, 47 Am. Dec. 305, and note; *Tillinghast v. Champlin*, 67 Id. 510; *Roberts v. McCarty*, 68 Id. 604; *Evans v. Gibson*, 77 Id. 565. The principal case is cited to this point in *Abbott's Appeal*, 50 Pa. St. 238; *McCormick's Appeal*, 57 Id. 59; and a purchase by one partner in his own name, with the funds of the firm, is a resulting trust within the exception of the statute of frauds: *Melly v. Wood*, 71 Id. 493; *Lefevre's Appeal*, 69 Id. 125. As between partners themselves, real estate may be shown to be firm property: *Shafer's Appeal*, 106 Id. 54; but partnership creditors cannot, by parol evidence, change the effect of a deed, and convert lands, individually held, into partnership assets, and thereby dislodge and postpone the otherwise preferred liens of individual creditors: *Abbott's Appeal*, 70 Id. 81; all citing the principal case.

PARTNERSHIP PROPERTY IS PRIMARILY SUBJECT TO FIRM DEBTS: *Bachus v. Murphy*, ante, p. 531, and note thereto.

BENFORD v. SANNER.

[40 PENNSYLVANIA STATE, 9.]

AGREEMENT, FOR GOOD CONSIDERATION, TO TRANSFER TO ANOTHER CERTAIN DRAFTS NOT YET RECEIVED, for services to be performed, is executory, and does not pass the property in the drafts.

AGREEMENT BY CREDITOR TO RECEIVE MONEY WHICH HIS DEBTOR HAD PROMISED TO ANOTHER is not a conspiracy, and his receipt of the money will not render him liable in damages to the other creditor, though he knew of the promise which the debtor had made.

DECLARATIONS OF PARTY JOINED AS DEFENDANT IN ACTION FOR CONSPIRACY are not admissible against co-defendant, if made after the alleged common design to defraud plaintiff has been accomplished; nor are they admissible against such co-defendant, until his connection with the common purpose has been shown *aliunde*.

TELEGRAM FROM WIFE OF ONE OF DEFENDANTS IN ACTION FOR CONSPIRACY, not written nor sent by either of them, is inadmissible as evidence against them. As the declaration of the wife, it could not affect even her husband.

ACTION AGAINST THREE, FOR FRAUDULENT CONSPIRACY TO OBTAIN CERTAIN DRAFTS, and to withhold proceeds from plaintiff. Where the evidence in such action failed to sustain the averments in the declaration as to the ownership of the drafts and the appropriation of the proceeds, knowing

them to be the plaintiffs, or to establish any complicity on the part of C., one of the defendants, *held*, that the court erred in its refusal to charge the jury that they were bound to render a verdict of not guilty as to him.

ERROR to the common pleas of Somerset county. Action on the case against three defendants, for conspiring to defraud plaintiff out of the proceeds of certain post-office drafts, which he alleged had been assigned to him by one of the defendants. The opinion sufficiently states the case.

Isaac Hugus, for the plaintiff in error.

Forward and Gaither, for the defendants in error.

By Court, **STRONG, J.** This was an action on the case in the nature of a writ of conspiracy. The declaration averred that James H. Benford, one of the defendants, for and in consideration of the sum of four thousand dollars, by him received on the eighteenth of October, 1858, agreed that he would transfer and assign to the plaintiff certain post-office warrants or drafts, falling due quarterly thereafter, to which the said Benford would become entitled for carrying the United States mails; that by virtue of said agreement, and the payment made therefor, the said warrants or drafts became the property of the plaintiff; that afterwards the several defendants did, corruptly and fraudulently, conspire to deprive and defraud the plaintiff out of said mail pay and proceeds of said post-office warrants or drafts, and of the said four thousand dollars; and that in pursuance of said conspiracy, the defendants did, falsely, corruptly, and fraudulently, receive a portion of said mail pay, and the proceeds of some of the warrants, to wit, those falling due on the fifteenth of November, 1859, and the fifteenth of February, 1860, and knowing the same to be the money of the plaintiff, did keep and appropriate the same to their own use.

Most of the errors assigned relate to the charge of the court, and mainly to the question whether there was any evidence against Cyrus Benford, one of the defendants, which ought to have been submitted to the jury. The evidence clearly exhibited that James H. Benford was indebted to Cyrus Benford in a large sum of money, and that Cyrus had also become surety for James in a number of promissory notes, upon which the amount due at the time of the alleged conspiracy, and overt act in pursuance of it, was nearly three thousand dollars. The agreement by which James H. Benford engaged to transfer and assign unto Sanner, the plaintiff, the post-office

warrants, amounting in all to about twelve thousand dollars, also stipulated that Sanner should pay out of them the notes in which Cyrus Benford had become surety for James. The purpose of the agreement was therefore not only to secure the plaintiff, but to protect Cyrus Benford. The latter had the same interest in it that the former had. After it had been executed, the first warrants obtained were allowed to go into the hands of the plaintiff. He did not, however, get the warrants for the quarter ending November 15, 1859, and February 15, 1860. These were obtained by James H. Benford, and out of their proceeds, one thousand three hundred and fifty dollars were paid to Cyrus Benford. A portion of the balance was paid to A. H. Coffroth, another surety of the mail contractor, and the remainder was retained by James H. Benford, or by his agent. This was the overt act of the alleged conspiracy, and the conspiracy itself was a combination to obtain these drafts and withhold the proceeds from the plaintiff.

It is to be observed that the agreement between James H. Benford and the plaintiff did not vest in the latter the ownership of the drafts. At the time when it was made they had no existence, and the service for which they were subsequently given had not been performed. Of course, the drafts were then incapable of transfer; nor did the agreement profess to transfer them. It was entirely executory. The utmost extent of the engagement of James H. Benford was, that he would transfer and assign the drafts, and that he would indorse them as they were received to the said Sanner for collection. The case is, therefore, not to be treated as a confederacy to deprive the plaintiff of anything that was his property. He had nothing more than a promise that James H. Benford would pay out of his future earnings. The evidence in the case utterly failed to sustain the averment in the declaration, and by virtue of the payment (of four thousand dollars) and the contract (of the said James H. Benford), the mail pay and post-office warrants or drafts became the property of the plaintiff, as also the other averment, that the defendants, knowing the proceeds of the warrants to be the money of Michael A. Sanner, did keep and appropriate the same to their own use and benefit. The conspiracy proved, then, if any was proved at all, was not such a conspiracy as was alleged in the declaration, and the overt act from which the plaintiff avers that he has suffered was of a character quite variant from that which is charged. The court was re-

quested to instruct the jury that no evidence having been presented showing any guilty complicity on the part of Cyrus Benford, one of the defendants, the jury was bound to render a verdict of not guilty as to him. This the court refused to do.

Another point propounded was, in substance, that Cyrus Benford, being a *bona fide* creditor of James H. Benford, and bound for him as surety in a much larger amount than he had received from the post-office drafts, anything done by him, not in violation of law, to secure himself cannot be taken as evidence of a conspiracy to defraud the plaintiff, but must be taken as an honest effort to protect himself. To this the court answered that "Cyrus Benford had large claims against his brother James, and he had the right to make every honest exertion to secure his money. It is only when the jury believe that he entered into a conspiracy with the other defendants to effect his object that he can be made responsible." We cannot agree with the court below in the view which they took of these two propositions. The proofs as exhibited to us furnish no evidence that Cyrus Benford was a party to any conspiracy into which the other defendants may have entered to defraud the plaintiff out of his rights. Nor has the defendant in error succeeded in showing us where such evidence is to be found. In March, 1859, he removed from Somerset, where his brother resided, to Meadville. In February, 1860, he was temporarily in Somerset, and perhaps again in March. He admitted that he had received one thousand three hundred and fifty dollars, and he said this in connection with the warrants. There is no evidence when he received the money, except what is to be found in the admissions of Uhl and James H. Benford, which were not admissible against him, because they were declarations made after the alleged common design had been accomplished. Even if they had been made in furtherance of the common purpose, they would not have been evidence against Cyrus Benford until his connection with that purpose had been first shown. To show such connection, they were of course to be rejected. Now, if it be conceded that the receipt of the drafts of James H. Benford in February, 1860, and his neglect or refusal to indorse them over to the plaintiff, was anything more than a breach of his contract, and if a combination between Uhl and him to divert them to the payment of other debts was a fraud upon the plaintiff, were the facts that Cyrus Benford was in Somerset in February shortly

before James went to Washington to obtain the drafts, and that he subsequently received some money which had been raised out of them, any evidence that he participated in the fraudulent combination? We think they were not, and that under the submission of the court, the jury have found the participation without evidence. The humane presumption of the law is against guilt, and though a conspiracy must ordinarily be proved by circumstantial evidence, yet it is not to be forgotten that the charge of conspiracy is easily made, and that in a race between creditors suspicions of unfairness are readily awakened. Mere suspicion, possibility of guilty connection, is not to be received as proof in such a case, and especially in such a case, because, when the connection is proved, the acts and declarations of others become evidence against the party accused.

But it is urged that Cyrus Benford knew when he received the money, part of the avails of the drafts, of the agreement between his brother James and the plaintiff, and there was evidence to that effect. How can that make any difference? If the drafts were not the property of the plaintiff, Cyrus Benford's receipt of their proceeds, in payment of a debt due him, was not an illegal act, and persuasion of his brother to pay the money to him was but the exercise of a right. If a creditor and his debtor agree that the latter shall pay to the former a sum of money, which the debtor had previously promised to pay, when received, to another creditor, it is not a corrupt and fraudulent conspiracy, and the receipt of the money, in pursuance of the agreement, will not make him liable to respond in damages to that other creditor, even though he knew of the promise which the debtor had made. The receipt is not illegal, and the agreement is, therefore, not fraudulent. The creditor who receives is not by the receipt, even with knowledge, made a party to a corrupt conspiracy. It was error in the court below, therefore, to submit to the jury to find that there was any guilty complicity with his co-defendants, in the alleged conspiracy, on the part of Cyrus Benford. The mistake doubtless arose from regarding the plaintiff as the owner of the drafts, when in truth he was not. The case was tried as if he was the owner; knowledge of the agreement was treated as knowledge of the plaintiff's ownership; and an arrangement between the defendants was assumed to be a combination wrongfully to deprive the plaintiff of his property. Thus, the court said that "it was wholly immaterial at what time Cyrus

Benford became connected with the common design; if such design existed, and he did join in it, and received the money with the guilty knowledge and intent charged in the *narr.*, he thereby adopted the acts of his co-defendants, and was bound by them." But he could not have had such knowledge as was charged in the declaration (that the drafts and the proceeds belonged to the plaintiff), for the fact did not exist, and therefore was not to be known. And in the answer to the third point of defendants, the court, while admitting the right of Cyrus Benford to make every honest exertion to secure his claims against his brother, said that he was only responsible when he entered into a conspiracy with the other defendants to effect the object. Yet a combination with the other defendants for such a purpose was not illegal, unless it was in fraud of the rights of Sanner, and Cyrus Benford was not responsible at all, unless the confederacy was to deprive the plaintiff of his property.

The remarks which we have made are applicable to the sixth assignment, in which the same error is apparent.

We think, also, the telegraphic dispatch from the wife of James H. Benford, dated February 29, 1860, was improperly admitted in evidence. It was neither written or sent by either of the defendants, and the declaration of the wife could not affect even her husband.

The other assignments of error are not sustained.

The judgment is reversed, and a *venire de novo* awarded.

CONSPIRACY, DEFINITION AND NATURE OF: *People v. Richards*, 51 Am. Dec. 82, note.

DECLARATIONS OF ONE CONSPIRATOR AS EVIDENCE AGAINST CO-CONSPIRATORS: See *Stovall v. Farmers' etc. Bank*, 47 Am. Dec. 85; *McCaskey v. Graff*, 62 Id. 336.

CONSPIRACY BY INSURANCE COMPANIES NOT TO INSURE BOAT: *Orr v. Home Mut. Ins. Co.*, 68 Am. Dec. 770.

WHAT CONSTITUTES INDICTABLE CONSPIRACY: *Alderman v. People*, 69 Am. Dec. 321; *Slomer v. People*, 76 Id. 786.

COMBINATION TO SEDUCE FEMALE IS CRIMINAL CONSPIRACY, although seduction is not a criminal offense at common law: *Smith v. People*, 76 Am. Dec. 780.

BOYCOTTING AS CRIMINAL CONSPIRACY: See *Smith v. People*, 76 Am. Dec. 783, note.

DECLARATIONS OF WIFE AGAINST HUSBAND, ADMISSIBILITY OF: See *State v. Jolly*, 32 Am. Dec. 656, 660, note; *Burnett v. Burkhead*, 76 Id. 358.

THE PRINCIPAL CASE IS CITED in *State v. Larkin*, 49 N. H. 44, to the point that the acts and declarations of a conspirator, to be admissible in evidence to charge his fellow-conspirator, must have been concomitant with the principal act, and so connected with it as to constitute a part of the *res gesta*.

BAYLER v. COMMONWEALTH.

[40 PENNSYLVANIA STATE, 37.]

CONVEYANCE OF ESTATE IN EXPECTANCY IS INOPERATIVE AT LAW, but may be enforced in equity as an executory agreement to convey, if it be sustained by a sufficient consideration.

WIFE'S MORTGAGE OF HER EXPECTANT INTEREST IN HER FATHER'S ESTATE, upon his death, to secure an antecedent debt of her husband, will not be enforced, the mortgagee not being a purchaser for value.

ERROR to the common pleas of York county. *Scire facias* in the name of the commonwealth for the use of Lucinda Jay, wife of Charles E. Jay, against Henry Bayler, on a recognizance entered into by him in the orphans' court of said county, with surety as heir at law of Jacob Bayler, deceased, to pay to the other heirs of the decedent their respective shares out of a certain portion of the real estate late of deceased. The opinion states the facts.

E. Chapin and E. H. Weiser, for the plaintiff in error.

V. K. Keesey, for the defendant in error.

By Court, STRONG, J. The mortgage given by Mrs. Jay and her husband to Henry Bayler was not a pledge or conveyance of any estate which she owned at the time of its execution. Nor did it profess to assure to the mortgagee any present interest. By it she bargained and sold to Henry Bayler, his heirs and assigns, "all the estate, right, title, and interest in law or in equity to which she would become entitled on the death of her father, Jacob Bayler, in his estate, real, personal, and mixed, by will, descent, or otherwise." She also covenanted, jointly and severally with her husband, to stand seised of the said estate, right, title, and interest, to the use of Henry Bayler and his heirs, and to make further assurances. Her father was then living. In his estate she had no property—no interest. The subject of the mortgage was, therefore, nothing which she then had. It was a mere expectancy; and the instrument of mortgage was made, not for any consideration then received by her, or parted with by the mortgagee, but solely for the purpose of securing a prior debt of her husband. Such being the facts of the case, and Mrs. Jay's father having since died, the question presented is, whether the mortgage is efficacious to enable the mortgagee to hold against her the share of the father's lands which descended to her.

It is an old and well-settled rule of the common law, that a mere possibility cannot be conveyed or released; and the

reason given for it is that a release or conveyance supposes a right in being: Shep. Touch. 319; Litt., sec. 446; 1 Inst. 265 a; *Arthur v. Bockenham*, Fitzg. 234; *McCrackin v. Wright*, 14 Johns. 193; *Davis v. Hayden*, 9 Mass. 514. At law, therefore, nothing passes by a deed of land of which the grantor is only heir apparent: certainly nothing by its direct operation. And this is as true of conveyances, which operate under the statute of uses, as of others. In such cases, there is no seisin to give effect to the statute; and without seisin a conveyance can only operate as a common-law grant. A covenant to stand seised to uses of land which the covenantor shall afterwards purchase is void: 2 Saunders on Uses, 83. A man cannot, by covenant, raise a use out of land which he has not: *Yelverton v. Yelverton*, Cro. Eliz. 401. Recitals, it is true, and covenants, may conclude parties and privies, and estop them from denying that the operation of the deed is what it professes to be. And when a deed purports to pass a present interest, recitals and covenants have, in many cases, been held efficacious to pass to the grantee an interest subsequently acquired by the grantor. But when the deed does not undertake to convey any existing estate, when the subject of the grant is only an expectancy, it is difficult to conceive of it as anything more than a covenant for a future conveyance. In the very nature of things, it must be executory. The case in hand is an apt illustration. The intention of the parties was not to convey any immediate interest, for it was known Mrs. Jay had none. The grant and the covenants alike contemplated an assurance to the mortgagee of an estate which might possibly thereafter be acquired either by descent or will, an assurance necessarily future.

But though a conveyance of an expectancy, as such, is impossible at law, it may be enforced in equity, as an executory agreement to convey, if it be sustained by a sufficient consideration. This has often been decided. In *Hobson v. Trevor*, 2 P. Wms. 191, Lord Chancellor Macclesfield compelled an execution of an agreement in marriage articles, to convey to the husband a third part of what should come to the father of the wife on the death of his father; and in *Beckley v. Newland*, Id. 182, the same chancellor enforced an agreement between the husbands of two presumptive heirs, to divide equally what should be left to either of them. A similar agreement was enforced also in *Wethered v. Wethered*, 2 Sim. 183; see also *Lyde v. Mynn*, 1 Myl. & K. 683; S. C., 7. Eng. Ch.

406. These were all cases of executory agreements. But in *Varick v. Edwards*, 11 Paige, 290, a formal conveyance of a possibility or expectancy, though it had been ruled inoperative at law, was held good in equity. And in *McWilliams v. Nisly*, 2 Serg. & R. 507 [7 Am. Dec. 654], Chief Justice Tilghman said that "if one enter into articles to convey, in case subsequent events should make it lawful, there could be no doubt that in equity he would be decreed to convey when he subsequently acquired the power." And he added he did not think the case less strong because, instead of entering into articles, he makes an absolute conveyance.

Regarding, then, the mortgage made by Mrs. Jay of the estate which she expected thereafter to inherit from her father, as inoperative at law, and valid only in equity, if valid at all, it is next to be seen whether a chancellor would enforce it. That he would not, unless it was made for a valuable consideration, will not be claimed. The equity of the mortgagee, if any, springs out of the consideration, and if that is wanting, he will vainly ask the aid of a chancellor. The reason why, before the act of April 11, 1848, the husband's voluntary assignment of a wife's chose in action did not destroy her right of survivorship, although he had succeeded to her dominion over the chose, was because a chose in action was assignable only in equity; and an assignee without value given was regarded as destitute of equity. In his behalf, therefore, no chancellor would move to enforce the assignment: *Hartman v. Dowdel*, 1 Rawle, 281. It is not to be doubted that a wife may mortgage her lands for her husband's debt, by uniting with him in the instrument. And if this had not been a mortgage of mere expectancy, it would have been good without the interposition of a court of equity. It is because this mortgagee must come into such a court that it becomes material to inquire whether there was such a consideration for the instrument as to induce a chancellor to interfere to give it effect. It was given to secure an antecedent debt of the husband. No new consideration was given at the time it was executed. The wife received nothing, the husband received nothing, the creditor parted with nothing. The instrument was, therefore, no more than a collateral security given for an old debt of the husband. As between Mrs. Jay and Henry Bayler, he was not a purchaser for value: *Petrie v. Clark*, 11 Serg. & R. 377 [14 Am. Dec. 636]; *Walker v. Geisse*, 4 Whart. 258 [33 Am. Dec. 60]; *Depeau v. Waddington*, 6 Id.

220 [36 Am. Dec. 216]. The question, then, is reduced to this: Will a court of equity interfere in favor of one who is an assignee or covenantee, but not for value, to enforce a wife's engagement to pay an old debt of her husband's? The answer is plain. If it will not decree the performance of an ordinary agreement, not founded on a valuable consideration, much less will it enforce such a contract against a *feme covert*.

A creditor of the husband, who asks that the wife's estate shall be applied to the discharge of her husband's debts, must show a legal right or a complete equity. It is by no means clear that a married woman can, by any form of conveyance, even in equity, convey the estate which she expects to inherit. I know of no case in which such a conveyance has been sustained, and I doubt whether it is authorized by the act of 1770, that established the mode by which the husband and wife may convey the estate of the wife. There are decisions in other states, that when a married woman, in conjunction with her husband, undertakes to convey her lands with covenants of warranty, her deed estops her from claiming an after-acquired title. The after-acquired estate, as in other cases, is held to feed the estoppel: *Nash v. Spofford*, 10 Met. 192 [43 Am. Dec. 425]; *Hill v. West*, 8 Ohio, 226 [31 Am. Dec. 442]. Even this, however, has been denied in New York, New Jersey, and New Hampshire. But the case is very different where the wife attempts to convey and warrant land which she does not own, but something which she hopes or expects afterwards to acquire. It may be doubted whether, to do such an act, all common-law disability does not remain. Whether this be so or not, her deed is no more than an executory contract, and if supportable in equity, requires a valuable consideration to give it life. There having been none for the mortgage of Mrs. Jay—no other having been shown than a precedent debt of the husband, which the instrument was given to secure—the court of common pleas committed no error in instructing the jury that it could not be enforced as the mortgage of the wife.

This view of the case makes it needless to consider the exception taken to the admission of evidence to contradict the commissioner's certificate of the wife's separate acknowledgment.

The judgment is affirmed.

CONVEYANCE BY HEIR APPARENT OF ESTATE IN EXPECTANCY, ESTOPPEL:
See *Trull v. Eastman*, 37 Am. Dec. 126, 128, note.

RELEASE BY HEIR APPARENT OF ESTATE IN EXPECTANCY: See *Curtis v. Curtis*, 63 Am. Dec. 651; *Needles's Ex'r v. Needles*, 70 Id. 85, 96, note.

ASSIGNMENT OF MERE EXPECTANCY WILL BE GIVEN EFFECT IN EQUITY: *McDonald v. McDonald*, 75 Am. Dec. 434.

MERE EXPECTANCY, NOT COUPLED WITH ANY INTEREST IN OR GROWING OUT OF PROPERTY, is not the subject of sale or mortgage: *Purcell v. Mather*, 76 Am. Dec. 307, 309, note.

THE PRINCIPAL CASE IS CITED in *Parsons v. Ely*, 45 Ill. 243, in support of the doctrine that a conveyance of an expectancy may be enforced in equity as an executory agreement to convey, if sustained by a sufficient consideration.

MILLER'S APPEAL.

[40 PENNSYLVANIA STATE, 57.]

QUESTIONS OF ADVANCEMENT ARE ALWAYS QUESTIONS OF INTENTION OF PARENT, and of intention at the time the property is received by the child.

MONEY EXPENDED BY PARENT FOR CHILD'S EDUCATION IS NOT TO BE PRESUMED ADVANCEMENT, without proof that such was parent's intention; nor is there such presumption where security is taken from the child for the amount received, or where the parent attempts to preserve evidence of it as a debt, by note, bond, book-account, or otherwise.

DECLARATIONS BY PARENT THAT HE INTENDED EXISTING DEBT AS ADVANCEMENT, not made to child, nor assented to by him, are not sufficient to convert such debt into an advancement.

APPEAL by George Miller from a decree of the orphans' court, distributing the fund in hands of administrators with will annexed of Joseph Miller, deceased. Said administrators filed an inventory, in which they included a book-account against George M. Miller, one of the heirs, and also one of the administrators. The amount charged was for educational purposes, and necessary expenses; and the charges commenced when George was about eighteen years of age, and ended when he was twenty-six. They were in his father's handwriting, in an account-book in which he kept his general accounts, and not in a book purporting to be a family book. Evidence was taken by the auditor as to whether the account was to be regarded as a common book-account, or as an advancement, and he held it to be the former; and as the greater part of the same was not recoverable as such, he disallowed it. A part, charged after George was of age, he admitted to be correct, and rejected the balance. On exceptions filed, the court overruled the auditor, and charged George with the whole amount. Appellant assigned error.

Joel B. Wanner and John S. Richards, for the appellant.

A. G. Green, J. S. Livingood, and John Banks, for the appellee.

By Court, STRONG, J. Our acts of assembly do not define an advancement, and we are therefore compelled to resort to the decisions of the courts to determine whether a sum of money received by a child from a parent, or expended for his benefit, is a gift or an advancement, or whether it is intended to create legal indebtedness. Questions of advancement are always questions of intention, and of intention when the property is received by the child. If it was a gift then, it cannot be converted into a debt by any subsequent act or intention of the father. If it was the creation of a debt, then it will continue a debt, notwithstanding any change of the parent's intention, unless some further act be done, or agreement be entered into to convert it into an advancement. The difficulties in solving such questions are generally found in the evidence from which the intention of the parent is to be gathered. A parent may be liberal to a child, more so than to his other children, without imposing any obligation for future accountability, either to himself or to his estate. It is, indeed, a common sentiment that equality is equity, but a father is under no legal obligations to make his children equal, and discrimination in a family is often equitable. The fact that one child has received more than another, therefore, raises no presumption that an advancement was intended. A contrary presumption exists when the money furnished is expended in the education of the child, for such education is a parental duty: *Riddle's Estate*, 19 Pa. St. 431; *Lentz v. Hertzog*, 4 Whart. 523.

This presumption may be overthrown by proof of the father's intention to furnish the money as an advancement, rather than in discharge of a parental duty, but without such proof it must prevail. It was overthrown in *Riddle's Estate*, 19 Pa. St. 431, by what evidence we do not know. The report only states that the father kept an account of the expenditures, and that the son believed it to have been his father's intention to charge him with them. Two successive reports of auditors found them advancements, and this court refused to set aside their decision, remarking, at the same time, that the court might not have drawn the same conclusion from the facts.

So, too, it is cogent evidence that an advancement is not intended by a father (and in most cases it is conclusive evidence)

that he takes from the child a security for the money furnished, or attempts to preserve evidence of it as a debt: *High's Appeal*, 21 Pa. St. 287. If the gift is designed to be irrevocable, there can be no reason for attempting to retain the power of recalling, and the attempt shows that it is not the purpose of the father to give up all possible control over it.

In the present case, both these presumptions against an intended advancement are raised more or less distinctly by the facts. The money which the appellant received from his father, or which was expended for his use, was furnished for his education, and at the time when it was furnished nothing was said or done by the parent to indicate an intention to treat it as a part of the son's portion. True, there is evidence that the case was not one of mere discharge of the parental duty to educate the son. The charges made indicate that. But before the money can be treated as an advancement, there must be affirmative evidence that it was intended to be neither a gift nor the creation of a debt, but a part portion. In some cases, this intention is inferred as matter of law, from the character of the act. Thus if a parent conveys land to the child from consideration of love and affection only, or pays the purchase-money of land conveyed by another to the child, the law presumes it an advancement, though not conclusively. But where personal chattels or money are delivered to the child, or paid for him, there must be evidence of an intention to make an advancement beyond the unexplained act of delivery or payment: *Johnson v. Belden*, 20 Conn. 322. Here the father made a charge of the sums of money furnished, not in a "family book" in which advanced portions are usually entered, but in his general day-book, in which he kept his accounts of debtor and creditor. The charge was made precisely as it must have been made had he intended to preserve evidence of his son's indebtedness. The appellant was charged as a debtor, and he was credited for partial repayments. All this is inconsistent with any intention then existing to make an irrevocable gift. It matters not that sums of money are not properly chargeable in a book of original entries. That would be important in an action between the father and the son; but it is of no consequence when we are seeking only for the intention of the father. We know that money is often thus charged, and though it cannot be recovered on such evidence, it is not to be doubted that it is generally intended as a memorandum of a debt, and a means of enforcing payment. In *Ashley's*

Appeal, 4 Pick. 21, it was ruled that sums of money, charged by a parent against his child in the usual way of keeping accounts, are not to be treated as advancements under the Massachusetts statutes.

Then, what is there on the other side to show that this, which was *prima facie* the creation of a debt, was not such, but was an advancement on account of a child's portion? Nothing in the admissions of the son; for while he acknowledged that he was charged in his father's book, there is no proof that he ever said the charge was anything else than evidence of a debt. All that there is must be found in a declaration to a single witness made by the father in 1856, long after most of the money was furnished and charged, and in the absence of his son. To G. E. Hurlocher he said: "George never worked much, or earned much at home. He charged George with every dollar he paid for his schooling. It is calculated it is to come off from his 'erbschaft' [inheritance]." There is no evidence that he ever made similar declarations to any other person. That such conversations of the father are not sufficient to convert a debt into an advancement is abundantly settled. In *Haverstock v. Sarbach*, 1 Watts & S. 393, it was laid down that loose declarations of a parent that he intended an existing debt should be an advancement, not substantiated by writing, nor made to the child, nor accompanied by any act, are not sufficient to destroy a debt secured by legal instrument, and change it into a gift by way of advancement; and in *Yundt's Appeal*, 13 Pa. St. 575 [53 Am. Dec. 496], declarations of a parent, made after debts have been contracted, of an intention to treat them as advancements, were held not admissible to produce that effect, when the declarations are not communicated to the child, nor accompanied by an act sufficient to obliterate the obligations as debts: *Levering v. Rittenhouse*, 4 Whart. 130; *Kreider v. Boyer*, 10 Watts, 54; *Porter v. Allen*, 3 Pa. St. 391. In *Wentz v. Dehaven*, 1 Serg. & R. 312, a written certificate of intention to give up a bond and mortgage of a son-in-law, and never demand them, delivered to the mortgagor, was held to be a release, and therefore the debt was treated as an advancement. That is very unlike the present case. Such a certificate would not now be held a release, and certainly a verbal declaration, made to a stranger, of an intention to treat a debt as an advancement, is still less. And the declarations of the father in this case to Mr. Hurlocher only show what his intention was when they were made. They

throw no light upon his intentions when the money was furnished. We are left to gather them from the charge in the book of accounts.

In fine, we are of opinion no evidence in the cause satisfactorily establishes that the money furnished by the father was originally intended as an advancement, or that it was made such by any subsequent act or declaration. The decree of the orphans' court, sustaining the second and third exceptions taken to the report of the auditor, must therefore be reversed.

The remaining assignment of error is not sustained. Judging from the amount of the estate and evidence, four hundred and fifty dollars was a sufficient compensation.

And now, to wit, July 24, 1861, this cause having been argued by counsel, and duly considered, it is ordered, adjudged, and decreed that the decree of the orphans' court be reversed, and the record is remitted with instructions to charge the accountants only with a balance of one thousand five hundred and thirty-five dollars and eighty-nine cents of personal property (the sum of nine hundred and sixty-two dollars and ninety-eight cents not being chargeable to George M. Miller as an advancement), and to cause distribution of the balance to be made according to the will of Joseph Miller and the intestate laws.

ON SUBJECT OF ADVANCEMENTS, GENERALLY, see *Fundt's Appeal*, 53 Am. Dec. 496; *Johnson v. Evans*, 50 Id. 669; *Phillips v. Gregg*, 36 Id. 158; *Murrel v. Murrel*, 49 Id. 664; *Batton v. Allen*, 43 Id. 630; *Black v. Whitall*, 59 Id. 423; *Chase v. Lockerman*, 35 Id. 277; *Jackson v. Jackson*, 64 Id. 114; *Grattan v. Grattan*, 65 Id. 726; *Rockhill v. Spraggs*, 68 Id. 607; *Needles v. Needles*, 70 Id. 85. Advancement made by husband to wife, presumption: See *Spring v. Hight*, 39 Id. 587.

ADVANCEMENT DEFINED, AND WHAT CONSTITUTES.—An advancement, in legal contemplation, as usually defined by the authorities, is the giving, by anticipation, the whole or a part of what it is supposed a child will be entitled to on the death of the parent or party making the advancement: *Osgood v. Breed*, 17 Mass. 358; *Casson v. Coppedge*, 1 Swan, 487; *Yancey v. Yancey*, 5 Heisk. 357; *Grattan v. Grattan*, 18 Ill. 167; S. C., 65 Am. Dec. 726; *Christy's Appeal*, 1 Grant Cas. 369; *Holliday v. White*, 33 Tex. 460; *Clark v. Willson*, 27 Md. 693; *Nolan v. Bolton*, 25 Ga. 356; *Dilman v. Cox*, 23 Ind. 440; *Bruce v. Griscom*, 9 Hun, 282; *Dunham v. Averill*, 45 Conn. 87; *Kintz v. Friday*, 4 Demarest, 540. The term "advancement" is an old word in the law, having a well-known legal signification, and is used to designate money or property given by a parent to his child or children as a portion of his estate, and to be taken into account in the final partition or distribution thereof: *Chase v. Ewing*, 51 Barb. 597; and see *Lawrence v. Lindsay*, 7 Hun, 645; *Eisner v. Kochler*, 1 Demarest, 277, 286. A recent definition of the term is "a gift by a parent *in presenti* of a portion or all of the share of his child in his estate,

which would fall to such child at the parent's death, by the statute of distribution or descent:" Freeman, J., in *Johnson v. Patterson*, 13 Lea, 626, 633. See, as to what is or is not an "advancement by portion," *Taylor v. Taylor*, L. R. 20 Eq. 297. A gift and conveyance of the title is an essential feature of an advancement: *Id.*; *Fearnell v. Henry*, 70 Ala. 484; S. C., 45 Am. Rep. 88. It is to be treated as a pure and irrevocable gift: *Crosby v. Covington*, 24 Miss. 619; *Grey v. Grey*, 22 Ala. 233; *Fellows v. Little*, 46 N. H. 27; *Harley v. Harley*, 57 Md. 340; and does not involve the elements of legal obligation or future liability on the part of the party advanced: *Id.* But although every advancement is a gift, *Sanford v. Sanford*, 61 Barb. 293, 299, S. C., 5 Lana. 486, yet an advancement is to be distinguished from an absolute gift having no view whatever to a portion or settlement: *Clark v. Willson*, 27 Md. 693. In case of a gift from parent to child, there is a purpose that the property given shall go to the child as something over and above the share of the other children of the donor: *Johnson v. Patterson*, 13 Lea, 626, 633; and there is no intention to have it chargeable on the child's share of the estate, as in the case of an advancement: *Weatherhead v. Field*, 26 Vt. 665, 668. So an advancement is distinguishable from a debt; for it creates no debt to the person making it, and the common relation of creditor and debtor does not exist: *Id.*; *Clark v. Willson*, 27 Md. 693; *Luquer's Estate*, 1 Tuck. 236; *Chase v. Ewing*, 51 Barb. 597; *Bruce v. Griscom*, 9 Hun, 280; nor is an advancement controlled by the same defenses as prevent the recovery of debts, such as infancy, limitation, etc.: *Hughes' Appeal*, 57 Pa. St. 179.

To constitute an advancement, it must result from a complete act of the ancestor in his life-time, by which he divests himself of all property in the subject, though in some cases, and under some circumstance, it may not take effect in possession until after the ancestor's death: *Harley v. Harley*, 57 Md. 340, 342; *Crosby v. Covington*, 24 Miss. 619; *Ison v. Ison*, 5 Rich. Eq. 19; *Grattan v. Grattan*, 18 Ill. 167; S. C., 65 Am. Dec. 726; *Yancy v. Yancy*, 5 Heisk. 357. Thus a portion secured to the child *in futuro*, or to commence after the father's death, or upon a contingency that has happened, or to arise within a reasonable time, is an advancement: *Hook v. Hook*, 13 B. Mon. 526; *Clark v. Willson*, 27 Md. 693. Nor is any particular formality or form of words required to indicate an advancement or its acceptance by the child: *Bulleley v. Noble*, 2 Pick. 337; *Holliday v. Wingfield*, 59 Ga. 206; *Brown v. Brown*, 16 Vt. 197; unless so prescribed by statute: See *Sayles v. Baker*, 5 R. L. 457; *Mowry v. Smith*, *Id.* 255; *Treadwell v. Cordis*, 5 Gray, 341; *Holliday v. Wingfield*, 59 Ga. 206; Cal. Civ. Code, sec. 1397.

ADVANCEMENTS, IN WHAT MADE.—Generally speaking, an advancement may be made in money, or in property of any kind, personal or real: See *Autrey v. Autrey*, 37 Ala. 614; *Fennell v. Henry*, 70 Id. 484; S. C., 45 Am. Rep. 88; *Dutch's Appeal*, 57 Pa. St. 461; *Murrel v. Murrel*, 2 Strobb. Eq. 151; S. C., 49 Am. Dec. 664. But in whatever made, it is essential that the advancement must once have been a part of the ancestor's estate, which, upon his death, would descend to his heirs but for the fact that it has, by the act of the ancestor in making the gift, been separated from or taken out of his estate, or it must be something which is purchased with the funds of the father in the name and for the benefit of the child: *Rickenbacher v. Zimmerman*, 10 S. C. 110; S. C., 30 Am. Rep. 37. Thus viewing an advancement, it was held that the amount of a policy of insurance procured by a parent on his own life, in the name of and for the sole benefit of his daughter, and the sum of the annual premiums paid by him until his death, were advancements made to the daughter: *Id.* Expenditures in maintenance or education of a child,

or trifling presents not regarded as useful in setting up the child in life, are not ordinarily deemed advancements: *Sanford v. Sanford*, 61 Barb. 293; S. C., 5 Lans. 486; *Riddle's Estate*, 19 Pa. St. 431; *Ison v. Ison*, 5 Rich. Eq. 15; *Fennell v. Henry*, 70 Ala. 484; S. C., 45 Am. Rep. 88; *Bruce v. Griscom*, 9 Hun, 280. Under New Jersey act of descents, advancements in money, made by a father in his life-time to one of his sons, can have no effect upon the share of the real estate of the father, which, at his death, descends to the son. Advancements in land only can have such effect: *Havens v. Thompson*, 23 N. J. Eq. 321. See, as to what will be regarded in equity as an advancement, *Foltz v. Wert*, 103 Ind. 404.

ADVANCEMENT, BY AND TO WHOM MADE.—As ordinarily defined, an advancement can only be made by a parent to a child: See *Osgood v. Breed*, 17 Masa. 358; *Holliday v. White*, 33 Tex. 460, and other cases cited above; or to a third person with the consent of the child: *Rains v. Hays*, 2 Tenn. Ch. 669. But by statutory provision in some of the states, advancements are made to apply equally to grandchildren: See *Fennell v. Henry*, 70 Ala. 484; S. C., 45 Am. Rep. 88; *Porter v. Porter*, 51 Me. 376. A deed of land from a father to his daughter's husband is not presumed an advancement to the daughter, and so of money paid by the father as surety for the husband: *Rains v. Hays*, 2 Tenn. Ch. 669; S. C. affirmed, 6 Lea, 303; S. C., 40 Am. Rep. 39; *Towles v. Roundtree*, 10 Fla. 299; but see *Stevenson v. Martin*, 11 Bush, 485. A husband may, voluntarily and without pecuniary consideration, make an advancement to his wife of a portion of his estate, when his creditors are not thereby defrauded: *Spring v. Hight*, 22 Me. 408; S. C., 39 Am. Dec. 587; and see *McCaw v. Burk*, 31 Ind. 56; *Renaker v. Lafferty*, 5 Bush, 88; *Murphy v. Nathans*, 46 Pa. St. 508; *Lochenour v. Lochenour*, 61 Ind. 595.

INTENTION AND PRESUMPTIONS AS TO ADVANCEMENTS.—It is well settled, as held in the principal case, that advancement is a question of intention. And in the absence of direct evidence of what occurred at the time the money or other valuable was given and received, the attendant circumstances are to be considered in determining whether it ought to be considered a loan, a gift, or an advancement. It necessarily becomes a subject of presumption: *Weaver's Appeal*, 63 Pa. St. 309; *Storey's Appeal*, 83 Id. 89; *Merker's Appeal*, 89 Id. 340; *Bradsher v. Cannady*, 76 N. O. 445; *Melvin v. Bullard*, 82 Id. 33, 38; *Graves v. Spedden*, 46 Md. 527; *Rains v. Hays*, 2 Tenn. Ch. 669; *Wilson v. Beauchamp*, 50 Miss. 24; *De Caumont v. Bogert*, 36 Hun, 382, 392; and see *Bowles v. Winchester*, 13 Bush, 1. Resort must be had to the facts and circumstances attending and making the transaction in order to determine its character: *Hine v. Hine*, 39 Barb. 507; *Bruce v. Griscom*, 9 Hun, 280; S. C., 70 N. Y. 612. A conveyance of land by a parent to a child, either directly or by a payment of the purchase-money, and having the deed made to the child, is, in the absence of proof to the contrary, presumed to be an advancement: *Murphy v. Nathans*, 46 Pa. St. 508; *Weaver's Appeal*, 63 Id. 309; *James v. James*, 41 Ark. 301; *Robinson v. Robinson*, 45 Id. 481; *Creed v. Lancaster Bank*, 1 Ohio St. 1; *Brown v. Burk*, 22 Ga. 574; *Sweet v. Northrup*, 12 N. Y. Week. Dig. 377; and this presumption is greatly strengthened when the value of the land bears any considerable proportion to the parent's whole estate: *Dutch's Appeal*, 57 Pa. St. 461; *Storey's Appeal*, 83 Id. 89; *Appeal of Miller*, 107 Id. 221, 227; and it has been held that the intention of the donor to advance to his daughter will be presumed from the fact that he conveys to her husband upon the sole consideration of the existence of the marriage relation between them: *Barber v. Taylor*, 9 Dana, 84; *Stevenson v. Martin*, 11 Bush, 485; and see *James v. James*, 41 Ark. 301; *Baker v. Leathers*, 3 Ind. 558. But

compare *Rains v. Hays*, 2 Tenn. Ch. 669; S. C. affirmed, 6 Lea, 303; S. C., 40 Am. Rep. 39. Generally speaking, when either money or property is given by a parent to a child, the presumption is that an advancement was intended: *Dillman v. Cox*, 23 Ind. 440; *Grattan v. Grattan*, 18 Ill. 167; S. C., 65 Am. Dec. 726; *Holliday v. Wingfield*, 59 Ga. 206; *Mitchell v. Mitchell*, 8 Ala. 414; *Woolery v. Woolery*, 29 Ind. 249; *Fennell v. Henry*, 70 Ala. 484; S. C., 45 Am. Rep. 88. But see *Johnson v. Belden*, 20 Conn. 322. So where the debt of a child is paid by the parent, in the absence of proof to the contrary, it will be presumed an advancement: *Johnson v. Hoyle*, 3 Head, 56. But it is well settled that the presumption of an advancement may be rebutted, either by the nature of the gift or by other evidence: *Smith v. Smith*, 21 Ala. 761; *Merrill v. Rhodes*, 37 Id. 449; *Autrey v. Autrey*, Id. 614; *Watkins v. Young*, 31 Gratt. 84, and cases above cited. But in the case of a purchase of land by a parent and conveyance to his son by his direction, the evidence necessary to overcome the presumption of an advancement, and prove a resulting trust, must not only be distinct and credible, but it must preponderate: *Robinson v. Robinson*, 45 Ark. 481; and see *Brown v. Burke*, 22 Ga. 574. No presumption of an advancement arises, however, when the transaction between parent and child assumes the form of a conveyance for value: *Appeal of Miller*, 107 Pa. St. 221. If a parent advances money to a child, taking notes therefor, *prima facie* such notes represent an indebtedness, and not an advancement, but this presumption is subject to rebuttal: *Cutliff v. Boyd*, 72 Ga. 302; and see *West v. Bolton*, 23 Id. 531; *Harley v. Harley*, 57 Md. 340. In case a parent be indebted to his children, and gives them property or money at their maturity or marriage, this is presumed a payment of the debt, and not an advancement, but the presumption is liable to be rebutted by the facts of the case: *Haglar v. McCombs*, 66 N. C. 345. It was held that a purchase or investment by a mother in the name of her child, or in the joint names of herself and her child, does not of itself afford the presumption of advancement, and that in such case the intention to advance is a question of evidence: *Bennet v. Bennet*, L. R. 10 Ch. Div. 474.

EVIDENCE, AND BURDEN OF SHOWING ADVANCEMENT.—A gift made with the intent of its being an advancement, and so accepted, may be proved to be such, though there be no writing either by the parent or child: *Bransford v. Crawford*, 51 Ga. 20. The intention may be ascertained by parol evidence of the donor's declarations at the time of executing the conveyance or making the gift, or of the donee's admissions afterwards, or by proof of facts and circumstances from which the intention may be inferred: *Clark v. Wilson*, 27 Md. 693; *Cecil v. Cecil*, 20 Id. 153; *Graves v. Spedden*, 46 Id. 527; *Watkins v. Young*, 31 Gratt. 84; *Morris v. Morris*, 9 Heisk. 814; and see *Ray v. Loper*, 65 Mo. 470. But loose declarations of a parent, that he intended an existing debt should be an advancement, not substantiated by writing, nor made to the child, nor assented to by him, nor accompanied by any act, are not sufficient to establish it: *Harley v. Harley*, 57 Md. 340; and see *Appeal of Miller*, 107 Pa. St. 221; *Weatherwax v. Woodin*, 20 Hun, 518. The parent's declarations must be shown to be a part of the *res gestæ*, and accompany the acts done: *Merkel's Appeal*, 89 Pa. St. 340; and the cases generally sustain the doctrine of the principal case that subsequent declarations of the parent, made in the absence of the child, are not binding on the latter: See *House v. Woodward*, 5 Coldw. 211; *Merriman v. Lacefield*, 4 Heisk. 215; *Fellows v. Little*, 46 N. H. 27. If, however, there be evidence of acts done or declarations made at the time of the transaction, tending to prove that the debt was intended by the parent as an advancement, his subsequent acts and declara-

tions in recognition of the original act and intention are entitled to great weight: *Merkel's Appeal*, 89 Pa. St. 340. So, circumstantial evidence is proper in determining whether advancements were made under a will: *McClintock's Appeal*, 58 Mich. 152. It has been stated as a rule that "when a testator, after the execution of a will, advances money to a legatee, it may be shown by oral evidence that it was intended as a satisfaction, in whole or in part, of the legacy; but if the will is silent on the subject of advancements, it cannot be shown by oral evidence that an advance made prior to the execution of the will was intended as a satisfaction, in whole or in part, of a legacy:" *Clark v. Kingsley*, 37 Hun, 246, citing *Camp v. Camp*, 18 Id. 217; *Zeiter v. Zeiter*, 4 Watts, 212; *Kreider v. Boyer*, 10 Id. 54; *Jones v. Richardson*, 5 Met. 247; *In re Peacock's Estate*, L. R. 14 Eq. 236; *Van Houten v. Post*, 32 N. J. Eq. 709. But see case last cited, reversed on appeal, 33 Id. 344, the court holding that the fact of the money having passed from the parent to the child, after the execution of the will, must be proved by other testimony than the parol declarations of the testator; and see *Sims v. Sims*, 10 Id. 158. On this subject, generally, see *Burnham v. Comfort*, 37 Hun, 216; *McClintock's Appeal*, 58 N. H. 152; *Taylor v. Cartwright*, L. R. 14 Eq. 167, in addition to cases cited above. The mere entry by a testator in one of his books, of a certain sum directed to be taken from a child's portion, as bequeathed to him by the will, is held to be insufficient to show an advancement to the child, and the fact of such advancement must be proved by evidence *aliunde*, which, in connection with the book, would establish the fact: *Lawrence v. Lindsey*, 68 N. Y. 108; *Benjamin v. Dimmick*, 4 Redf. 7; *Marsh v. Brown*, 18 Hun, 319; and see *Lawrence v. Lawrence*, 4 Redf. 278. So a testator's certificate that he has advanced a specified sum to an heir, over and above all set-offs to date, is inadmissible in evidence that such advancement was made; but if the payment is otherwise proved, the certificate is admissible to show the testator's purpose to treat it as an advancement: *McClintock's Appeal*, 58 N. H. 152. Deeds of lands which have never been delivered, being worthless for every purpose, constitute no proof of advancements made: *Appeal of Miller*, 107 Pa. St. 221. Charges in books made by the parent against a child have been long admitted in the courts of New Jersey, as tending to show advancements, but such evidence as to the fact of passing over the money is said to be of a low grade: *Van Houten v. Post*, 33 N. J. Eq. 344. It is well established that the presumption of an advancement may be rebutted by parol evidence: *Smith v. Smith*, 21 Ala. 761; *Merrill v. Rhodes*, 37 Id. 449; *Cecil v. Cecil*, 20 Md. 153; *Dillman v. Cox*, 23 Ind. 440; *Woolery v. Woolery*, 29 Id. 249; it is always competent to meet and repel the presumption by proof of circumstances showing that an advancement was not intended: *Bay v. Cooke*, 31 Ill. 336.

As it regards the burden of proof, this devolves upon the party claiming the advancement to show that it was made. But the evidence need not be conclusive, a preponderance of testimony being ordinarily sufficient to establish the fact: *Middleton v. Middleton*, 31 Iowa, 151. But where notes are executed by a child to his parent, *prima facie* they represent an indebtedness, and the burden of proof is upon the party who sets up the fact of advancement to show by clear and indubitable proof that what is so clearly apparent to be simply a debt due was intended, either originally or subsequently, to be an advancement instead of a debt: *Harley v. Harley*, 57 Md. 340; and see *Grey v. Grey*, 22 Ala. 233; *High's Appeal*, 21 Pa. St. 283; *Cutliff v. Boyd*, 72 Ga. 302.

CHANGE OF ADVANCEMENT INTO GIFT, OR VICE VERSA.—Money or property given by a parent to a child, though *prima facie* an advancement, may be shown to have been a mere gift, and not intended as an advancement; but the burden of proof in such case rests upon the party claiming it as a gift: *Morris v. Morris*, 9 Heisk. 814, 817; and the proof that a gift was intended must be clear and unmistakable, to be arrived at from a survey of the conduct and conversation of the donor at or about the time of the gift: *Johnson v. Patterson*, 13 Lea, 626. An advancement may be changed by mutual agreement into an absolute gift, and it is held to be unnecessary that this should be done by will: *Wallace v. Owen*, 71 Ga. 544; and see *Harper v. Parks*, 63 Id. 705. So an absolute gift to a child of the donor may be changed into an advancement, with the consent of the donee: *Wallace v. Owen*, 71 Id. 544. Compare *Lawson's Appeal*, 23 Pa. St. 85. But it is held that a gift absolute, when made, cannot be converted into an advancement by any subsequent statement of a wish to that effect by the donor, short of a legally executed will: *Bradsher v. Cannady*, 76 N. C. 445. And subsequent declarations of a parent, made in the absence of the child, are not admissible to convert what was *prima facie* a debt into an advancement: *Oller v. Bonbrake*, 65 Pa. St. 338, citing principal case.

EFFECT OF ADVANCEMENT, AND HOW VALUED.—An advancement operates to reduce the distributive share of the child by the amount so received, its value to be estimated at the time of receipt or possession given, and not at the time of the death of the intestate: *Hughes's Appeal*, 57 Pa. St. 179; *Par-year v. Cabell*, 24 Gratt. 260. Advancements, whether of real or personal estate, are to be so valued: *Stevenson v. Martin*, 11 Bush, 485; *Oyster v. Oyster*, 1 Serg. & R. 422; *Keys v. Keys*, 11 Heisk. 425; *Pigg v. Carroll*, 89 Ill. 205; *Williams v. Stonestreet*, 3 Rand. 559; but see *Rickenbacker v. Zimmerman*, 10 S. C. 110; S. C., 30 Am. Rep. 37; and are not in general chargeable with interest: *Miller's Appeal*, 31 Pa. St. 337; *Estate of Ford*, 11 Phila. 97; *Krebs v. Krebs*, 35 Ala. 293. Interest should not at least be charged during the life-time of the intestate: *Id.*; *Johnson v. Patterson*, 13 Lea, 626; *Williams v. Williams*, 15 Id. 438; *Kyle v. Conrad*, 25 W. Va. 760. The reasons given for the above rule of valuation are, that when property is received as an advancement, it belongs to the party receiving it; and if lost, in whole or in part, by destruction or deterioration, it is his loss; and it is but fair, as a compensation to the party for this risk of loss, that if the property is increased in value, he should be benefited by the increase: *Id.*; *Knight v. Yorborough*, 4 Rand. 569; *Kean v. Welsh*, 1 Gratt. 406; *Nelson v. Wyon*, 21 Mo. 347, 352; and see *Manning v. Manning*, 12 Rich. Eq. 410; and interest ought not to be charged during the life-time of the intestate, otherwise it would defeat the main object of the statute requiring advancements to be brought into hotchpot, which is to produce equality among all the children of an intestate father: *Kyle v. Conrad*, 25 West Va. 760. The value of a policy of insurance bought and paid for by a father in the name of his daughter, and charged to her as an advancement, must be estimated at the time of the father's death, relation being had to its situation at the time of the gift, that is, when it was issued: *Bickenbacker v. Zimmerman*, 10 S. C. 110; S. C., 30 Am. Rep. 37; and see *Bowles v. Winchester*, 13 Bush, 1.

The acceptance by a child of an advancement in full of his share in his parent's estate, bars him from any claim thereon: *Kerahaw v. Kerahaw*, 102 Ill. 307; *Galbraith v. McLain*, 84 Id. 379; and in the event of his death intestate, his children are also barred from any such claim: *Simpson v. Simp-*

son, 114 Ill. 603; 2 Northeastern Rep. 258 (Sup. Ct. Ill.); S. C., 4 Am. Pro. Rep. 435; and see *Eshleman's Appeal*, 74 Pa. St. 42.

HOTCHPOT.—The idea of requiring children, who have been advanced during the life-time of the father, to bring the money or property thus received into hotchpot, is to bring about an equalization of the shares of all the children: See 2 Bla. Com. 516; 4 Kent's Com. 419; *Distributees etc. v. Mitchell*, 8 Ala. 414. By the term "hotchpot" is meant that each child is to draw, at death of the parent, an equal proportion: *McCaw v. Blewitt*, 2 McCord Ch. 90; *McLure v. Steele*, 14 Rich. Eq. 105, 116; and see *Ison v. Ison*, 5 Id. 15; *Kyle v. Conrad*, 25 W. Va. 760; *Knight v. Oliver*, 12 Gratt. 33, 45. It is a subject of statutory provision, under which the child advanced may elect to retain what he has received, or he may throw the amount into the common stock, and claim his equal share with the others in the distribution of the estate, and this is bringing the advancement into hotchpot: *Grattan v. Grattan*, 18 Ill. 167; S. C., 65 Am. Dec. 726; *Daves v. Haywood*, 1 Jones Eq. 253; *Nelson v. Bush*, 9 Dana, 105. The party does not thus relinquish his title to the advancement, it being brought in merely to see whether it exceeds or falls short of an equal share: *Jackson v. Jackson*, 28 Miss. 674. But if a child refuses to bring his advancement into hotchpot, it is a relinquishment of all interest in the estate as a distributee: *Grattan v. Grattan*, 18 Id. 167; S. C., 65 Am. Dec. 726; *Taylor v. Reese*, 4 Ala. 121; *Ray v. Loper*, 65 Mo. 470. The provision for bringing advancements into hotchpot applies only in cases of intestacy: *Thompson v. Carmichael*, 3 Sandf. Ch. 120; *Richmond v. Vanhook*, 3 Ired. Eq. 581; *Breton v. Breton*, 30 Ga. 416; *Huggins v. Huggins*, 71 Id. 66. Nor are advancements to children brought into hotchpot for the benefit of the widow: *Jackson v. Jackson*, 28 Miss. 674; *Logan v. Logan*, 13 Ala. 653; *Knight v. Oliver*, 12 Gratt. 33; she is only entitled to a share in the estate of the intestate of which he died possessed: Id. In case of a father dying intestate, and advancements brought into hotchpot, the children to whom they were made should be charged with the value of the property when received: *Ray v. Loper*, 65 Mo. 470; *Kyle v. Conrad*, 25 W. Va. 760; but not with the rents and profits of the land conveyed to them severally, nor with the increase of the personal property, nor with the interest on the value received of either the real or personal property during the life-time of the father: Id.; and see *Puryear v. Cabell*, 24 Gratt. 260; *Nelson v. Wyan*, 21 Mo. 347. But it is held that they must be charged with interest from the death of the intestate on the value, when received, of all property, real or personal, so advanced: *Kyle v. Conrad*, 25 W. Va. 760. Compare *Williams v. Williams*, 15 Lea, 438; *Estate of Ford*, 11 Phila. 97.

THE PRINCIPAL CASE IS CITED in *Oller v. Bonebrake*, 65 Pa. St. 344, to the point that declarations of a parent, made subsequently, and in the absence of the child, are inadmissible to turn what was *prima facie* a debt into an advancement. It is cited and explained in *Hughes's Appeal*, 57 Id. 181, and the reason of the decision said to be based upon the distinction between a debt and an advancement.

GLASS v. WARWICK.

[40 PENNSYLVANIA STATE, 140.]

EQUITY WILL ENFORCE CLAUSE IN PURCHASE-MONEY MORTGAGE, EXECUTED BY MARRIED WOMAN, without husband joining, stipulating for payment of interest at stated periods, and that in case of default to pay such interest, the whole amount of the mortgage should become due and payable.

SCIRE FACIAS on mortgage. The opinion sufficiently states the case.

A. and E. D. Parker, for the plaintiffs in error.

Edmund S. Doty, for the defendant in error.

By Court, LOWRIE, C. J. A married woman bought land, received the deed, and gave bonds and mortgage for a balance of the purchase-money, all in her own name alone. This balance was to be paid at the death of two women, annuitants, and during their life the interest was to be annually paid to them, and the bond says that, on default for six months in paying the interest, the principal "may be collected as fully due," and the mortgage recites this fully, and of course the defeasance is, that the mortgage estate shall be void on the performance of the conditions of the bond, otherwise not; and the deed is made subject to the payments required by the bond and mortgage. There was a default of more than six months in paying the interest, and immediately thereafter this suit was brought on the mortgage.

In strict law, a married woman has no power to make any such contracts, except when joined with her husband, and it is only by way of equity that they are enforced, and so as to prevent great injustice. And they are enforced rather according to the necessities of common justice than according to the terms of the contract. If there was nothing but the contract to control the case, we might possibly relieve Mrs. Glass, on her paying up the arrears. But it would be great injustice to the other parties to put them under the necessity of annually appealing to court for their little annuity of twenty-eight dollars and fifty cents. Since she will not pay the annuity punctually, she ought to pay the principal, so that the annuity can be better secured elsewhere. We understand that the meaning of the parties is that, on the specified delay and default, the whole principal might be at once collected by suit, and this suit is the only one that can be brought that is available for the purpose, and it ought to avail.

Judgment affirmed.

MORTGAGES BY MARRIED WOMEN: See *Jamison v. Jamison*, 31 Am. Dec. 536; *Waring v. Smyth*, 47 Id. 299.

ENFORCEMENT OF MORTGAGE GIVEN BY MARRIED WOMAN: *Caldwell v. Walters*, 55 Am. Dec. 599, note.

BOND OF FEME COVERT IS, IN GENERAL, VOID AT COMMON LAW: *Palmer v. Oakley*, 47 Am. Dec. 41; *Hollis v. Francois*, 51 Id. 760.

THE PRINCIPAL CASE IS CITED in *Shuyder v. Noble*, 94 Pa. St. 288, in support of the rule that the bond of a married woman, where given to secure the purchase-money of land sold to her, may be enforced against such land.

SWOPE v. ROSS.

[40 PENNSYLVANIA STATE, 186.]

PAYMENT BY ACCEPTOR OF BILL OF EXCHANGE EXTINGUISHES DEBT, and no right of action remains against drawer or indorser unless the acceptance was *supra protest*.

ACCEPTANCE IS ENGAGEMENT TO PAY BILL ACCORDING TO TENOR AND EFFECT AT MATURITY, and not before. And a bill is "paid" only when it is done in due course, and with an intention to satisfy and discharge it.

DRAWER OF BILL MAY ACCEPT OR PAY IT UNDER PROTEST, FOR HONOR OF DRAWER OR INDORSER, but if he discounts it before maturity, he occupies the position of an indorsee for value, as against all prior parties.

ACTION of *assumpsit* between George Ross & Co., plaintiffs, and Swope & Karns, in which the following case was stated for opinion of court: One Forward gave to Swope & Karns a writing as follows: "Somerset, Pa., August 18, 1859. George Ross & Co., bankers, pay to Swope & Karns, or order, ninety days from date, six hundred and sixteen dollars. Ross Forward." On or about the first of September thereafter, Swope delivered this paper (indorsed Swope & Karns) to plaintiffs' bank, and had it discounted. Forward was one of the firm of George Ross & Co. at the time the check was given, and when it was discounted, but went out on the nineteenth of September, 1859. On maturity, Forward had no funds in the bank, and the paper was regularly protested on the nineteenth of November, 1859. On this state of facts, the court entered judgment for plaintiffs, and defendants assigned error.

Hugus and Kimmel, for plaintiffs in error.

Forward and Gaither, for defendants in error.

By Court, STRONG, J. The question presented by the case stated is quite novel, and we have not been able to find that it has been adjudicated. Undoubtedly, the acceptor of a bill

of exchange is the principal debtor, and the drawer and indorsers are but sureties. Of course, the acceptor, even after payment, cannot sue either the drawer or indorser of the bill unless his acceptance was *supra protest*. His payment of the bill extinguishes it, but the case stated finds that the plaintiffs discounted the bill for the payees before it became payable, not that they accepted it or paid it. Discounting a bill, though it be done by the drawee, is neither acceptance nor payment. Acceptance is an engagement to pay the bill according to its tenor and effect when it becomes due, not before. A bill is paid only when there is an intention to discharge and satisfy it. In *Burbridge v. Manners*, 3 Camp. 194, Lord Ellenborough said: "That even payment of a bill before it became due does not extinguish it any more than if it were merely discounted;" and added that "payment means payment in due course, and not by anticipation." His lordship evidently thought that discounting a bill by a drawee is neither payment nor extinguishment. In *Attenborough v. McKenzie*, 36 Eng. L. & Eq. 562, in the English court of exchequer, it was held that if the acceptor of a bill discounts it he may reissue it so as to charge the drawer; that nothing will discharge the drawer but payment; *i. e.*, payment when due, or payment for the purpose of discharging and satisfying the bill. Therefore if the acceptor discounts the bill for the drawer, and then indorses it away, the drawer will be liable upon it to the holder, and the transfer by the drawer to the acceptor will operate as an indorsement, although at the time, the drawer does not intend to transfer, by way of indorsement, being under the impression that the bill is discharged by coming into the hands of the acceptor. Nor will the payment of the amount less the discount be deemed a payment of the bill by the acceptor. In that case, the holder of the bill took it by indorsement after it was due from the transferee of the acceptor. The ruling goes to the length that even the accepting drawee of a bill may take it as an indorsee, and as such may issue it. It also decides that he does take it as an indorsee when he discounts it. Can, then, the drawee of a bill payable on time, who has discounted it, maintain an action on it against the drawer or indorser if it be protested for non-payment, and notice be given? He is not a party to the bill until he has accepted it. Until then, he has not assumed the position of principal debtor, nor undertaken any obligation in regard to it. His discounting has neither paid nor extinguished it, and it is not a promise to

pay according to its tenor and effect. Is he precluded from becoming an indorser by the fact that the bill was directed to him? It seems well settled that the drawee of a bill may accept or pay it, *supra protest*, for honor of the drawer or indorser; and if he takes it up, he stands in the position of an indorsee, paying full value for it, has the same remedies to which an indorsee would be entitled against all prior parties, and can, of course, sue the drawer or indorser: Ch. Bills, 375. In such cases, the fact that the bill was drawn upon him does not incapacitate him from acquiring the rights of an indorsee. No reason is apparent for a different rule where the drawee becomes the holder by discounting the bill before its dishonor.

Uncertain whether the drawer will put funds into his hands to meet the bill at maturity, he may well refuse to accept, and yet may discount it on the credit of both the drawer and indorser. If he does not accept, he is as much a stranger to it as any other person discounting it, for the drawer or indorser is but purchasing the contract, and the contract thus purchased is that the drawee will pay the bill on presentment, when it shall fall due, or in case of his failing to do so, that the parties whose names are already upon it will pay, if due notice of its dishonor be given to them. The promise is made by the parties to the bill. The purchaser enters into no engagement.

These views accord with the doctrine laid down in *Desha, Shepherd, & Co. v. Steward*, 6 Ala. 852, a case which more closely resembles the present than any we have been able to find. In it the supreme court of that state ruled that the drawees of a bill may sue the drawer or indorsers after it has been dishonored, even though they obtain the bill before its dishonor; and that until acceptance they are strangers to the bill, and may acquire rights to it, and stand in the same condition as any other holder. It was said that there is no legal presumption if the drawee comes into possession of the bill previous to its dishonor, that he takes it with the obligation to accept.

Such being in our opinion the law, it was not error that the court of common pleas gave judgment for the plaintiff upon the case stated. The fact is not distinctly found that notice of dishonor of the bill was duly given to the defendants, but it was collected on the argument that such was the fact, and that such is the meaning of the case stated.

The judgment is affirmed.

ACCEPTANCE OF BILL OF EXCHANGE, HOW MADE: *Spear v. Pratt*, 38 Am. Dec. 600, 601, note; *Read v. Marsh*, 41 Id. 253.

ACCEPTANCE OF BILL BY PAROL: *Fisher v. Beckwith*, 46 Am. Dec. 174; *Wells v. Brigham*, 52 Id. 750; *Walker v. Lide*, 44 Id. 252.

NATURE AND EFFECT OF CONTRACT OF ACCEPTANCE: *Parks v. Ingram*, 55 Am. Dec. 153; *Heaverin v. Donnell*, 45 Id. 302; *Bank of Illinois v. Sloo*, 35 Id. 223; *Perry v. Harrington*, 37 Id. 98; *Fisher v. Beckwith*, 46 Id. 174; *McCall v. Corning*, 48 Id. 454; *Kendall v. Galvin*, 32 Id. 141; *Davis v. McCready*, 72 Id. 461; *McKleroy v. Southern Bank*, 74 Id. 438.

LIABILITY OF DRAWER OF BILL AFTER ACCEPTANCE: *Thatcher v. Mills*, 65 Am. Dec. 95; *Brailsford v. Williams*, 74 Id. 559; *Adams v. Darby*, 75 Id. 115.

ACCEPTOR OF BILL IS PRINCIPAL DEBTOR: *Diversy v. Moor*, 74 Am. Dec. 157.

ACCOMMODATION ACCEPTOR DOES NOT BECOME CREDITOR OF DRAWER until he has actually paid the bill: *Henderson v. Thornton*, 75 Am. Dec. 70.

THE PRINCIPAL CASE IS CITED in *Rogers v. Gallagher*, 49 Ill. 185, to the point that a note or bill of exchange discounted by the acceptor before maturity does not lose its negotiability, but may again be put in circulation, and parties whose names appear on it be bound as though it had not passed through the acceptor's hands.

MILLER v. PITTSBURGH ETC. R. R. Co.

[40 PENNSYLVANIA STATE, 237.]

CONDITION IN CONTRACT OF SUBSCRIPTION TO STOCK OF RAILROAD COMPANY, that road should be located and constructed along designated route, is not condition precedent, requiring the actual construction and completion of the road before payment could be required, but only means that when the road was located and constructed, it should occupy the route designated.

GUARANTY THAT COMPANY WILL PAY INTEREST ON STOCK "AS SOON AS PAID" constitutes no defense to action against stockholder on his contract of subscription, although the company has suspended operations.

ACTION of *assumpsit* to recover unpaid installments on twenty shares of railroad stock. Verdict and judgment for plaintiffs, and defendant assigned error. The opinion states the case.

Baer Brothers, for the plaintiff in error.

William H. Koontz, for the defendants in error.

By Court, WOODWARD, J. The plaintiff in error, defendant below, subscribed for twenty shares of the capital stock of the above-named railroad company, on the express condition that the company "should locate and construct their railroad along the route contemplated by the Meyer's Mill Plank-road Company for their road." It was proved that the railroad had been located along that route; that it was completed from Connellsville to Turtle creek, and advancing from there to Pitts-

burgh; that two hundred and eighteen thousand dollars had been expended at Sand Patch tunnel, in Somerset county, east of Meyer's Mill; and that the whole work had progressed so far as to reduce the completion of the road to nine months' more work, when, in October, 1857, the company suspended operations.

The defendant paid the first installment of his stock, and part of his second, but neglected to respond to the calls for the residue of his subscription, all of which were duly made before January, 1855. This action was brought to enforce payment of these calls. The defense is, that though the company have located their road agreeably to the above condition, they have not constructed it, and therefore subscribers are not bound to pay.

It is a most extraordinary defense, for it presupposes that the company were to build their road without money, and to deliver it a finished work to the stock subscribers, who were then to pay their subscriptions. Such was not the contract. By his subscription the defendant made himself voluntarily a member of a company incorporated and authorized to build a railroad from Pittsburgh to the Maryland line, east of the mountains—a company to be governed by directors, who should dictate when and where to begin the work, and how its means should be applied—a company with an authority to enact by-laws, and make calls for payment of stock—a company to whose vigorous prosecution of their work prompt payments on the part of stockholders, in obedience to calls, were indispensable.

Of such a company Miller made himself a member, and now sets up the partial failure of the company to complete their work, as the justification for his almost total failure to supply the means he agreed to supply. His promise was precedent to theirs. He has no right to insist on performance by them, whilst he refuses performance on his part. Had he and the other subscribers paid promptly, in obedience to calls, as they promised, possibly the panic of 1857 would not have suspended the work. The stock payments were indispensable, not only as furnishing funds which the company had a right to rely on, but as constituting also a solid basis of credit on which to negotiate the bonds of the company. The modern expedient chiefly relied on for building railroads is mortgage bonds, but to give these credit in the markets of the country, the payment in of a cash capital is indispensable.

All these things Miller knew, or ought to have known, when he subscribed, and therefore the defense now attempted is simply absurd. The condition in his contract did not mean that the road should be constructed and finished before he paid, but only meant that when it was located and constructed it should occupy the route designated. On his part the undertaking was to pay as calls should be made. On the company's part the undertaking was to locate as stipulated, and to construct *bona fide* as fast as the means at their command would allow. This was the whole scope and effect of the condition. A suspension of the work two years and a half after the time when every dollar of the defendant's subscription ought to have been in the treasury of the company is no defense for him. The necessity for that suspension was no doubt aggravated, perhaps induced, by the failure of himself and others to pay up this stock, but whether it was or was not, the suspension was the exercise of a discretion which every subscriber had committed to the directors. Let them not complain, therefore, that their constituted agents have, under the pressure of the times and the default of subscribers, exercise the discretion that was voluntarily committed to them for the benefit of the common enterprise. Until it can be shown how railroads can be built without money, no such defense as is here set up can prevail.

But there is breach of another condition alleged. This company conformed to the foolish practice of receiving subscriptions on a guaranty that they would pay interest on stock "as soon as paid," until the road is finished. When it is considered that railroad companies are joint-stock associations, and depend on borrowing most of the money they expect to expend, the absurdity of borrowing money to pay interest to themselves is self-evident. They never borrow at less than from seven to ten per cent, and in so far as the money is used to pay themselves six per cent on their stock, it is manifestly a ruinous as well as absurd operation. No intelligent stockholder who has the interest of the enterprise at heart ought to accept or insist on such a condition.

Still, where it is inserted in the contract, it must be judicially administered, and for the present case we may dispose of it as follows: in this contract the interest is not payable until the stock be fully paid. "As soon as paid," interest was to accrue; and such was the effect of the resolution of February 22, 1854. But the defendant has not paid. He then has no breach to

complain of. He points to the resolution of the board of the fifteenth of October, 1857, suspending the payment of interest, as ground for not paying moneys due in January, 1855. This is, if possible, a more curious defense than the former. Had he paid his stock, he would have been entitled to receive interest. But because the company could not pay other stockholders' interest in 1857, he justifies himself for withholding moneys due in 1855. This action is to enforce the calls that were not responded to. If such a defense is worth anything now, it ought to have been good when the calls were made. But it would not have been easy to state it then, for it was wrapped up in the womb of the future, and possibly could never have been born, if the defendant had performed according to his undertaking, for in that event the company might have been able to pay the interest.

It is scarcely possible to conceive of a defense more destitute of merit, and accordingly the judgment is affirmed.

PERFORMANCE OF CONDITION PRECEDENT WHEN REQUIRED OF CORPORATION: *People v. T. R. Co.*, 35 Am. Dec. 551; *Martin v. Pensacola etc. R. R. Co.*, 73 Id. 713.

VALIDITY OF SUBSCRIPTION TO INDUCE RAILWAY COMPANY TO LOCATE BRIDGE AT PARTICULAR POINT: *Cumberland etc. R. R. Co. v. Baab*, 36 Am. Dec. 132; as to future location of road: *Wight v. Shelby R. R. Co.*, 63 Id. 522.

WHEN SUBSCRIPTION TO CORPORATE STOCK IS COMPLETE: *Penobscot R. R. Co. v. White*, 66 Am. Dec. 257; *New Albany etc. R. R. Co. v. McCormick*, 71 Id. 337.

SUBSCRIPTION TO STOCK OF COMPANY, WHEN FRAUD UPON SUBSEQUENT SUBSCRIBERS: *Robinson v. Pittsburgh etc. R. R. Co.*, 72 Am. Dec. 792.

THE PRINCIPAL CASE IS CITED in *Pittsburg etc. R. R. Co. v. County of Allegheny*, 63 Pa. St. 136, as denouncing the practice of paying interest on stock, and to the point that a corporation, without authority, cannot bind itself for interest on stock.

WEST BRANCH INSURANCE CO. v. HELFENSTEIN.

[40 PENNSYLVANIA STATE, 289.]

LAW OF LEGAL RELATION BETWEEN INSURERS AND ASSURED IS POLICY OF INSURANCE, with its clauses, conditions, and stipulations, by which the mutual rights and liabilities of the parties are to be understood and measured.

POLICY OF INSURANCE UPON MERCHANDISE TO BE USED FOR TRAFFIC ATTACHES TO SUBSEQUENT PURCHASES THEREOF, and is an indemnity against the loss of the stock in the possession of the assured at the time of a fire.

CONDITION IN POLICY FORBIDDING TRANSFER OF TITLE IN PROPERTY INSURED, without assent of insurers, is not broken by a demise of part of the insured premises.

NOTICE OF LOSS TO SECRETARY OF COMPANY IS SUFFICIENT, if transmitted in writing by local agent of company, upon information conveyed to him by the assured. Requirement that notice of loss be given to the secretary of the company by the assured, in writing, is thus satisfied.

ASSURED MUST EXERCISE DUE DILIGENCE IN VIEW OF ALL CIRCUMSTANCES OF CASE, under a condition that notice of loss be given to the company forthwith.

PARTY MAY GIVE PAROL EVIDENCE OF CONTENTS OF PAPER, if opposite party fails to produce the paper upon the trial, after being notified to do so.

CONDITION IN POLICY OF INSURANCE AGAINST ASSIGNMENT AFTER LOSS would be void, as inconsistent with the covenant of indemnity, and as contrary to public policy.

ACTION of *assumpsit* to recover the amount of a loss sustained by plaintiff in consequence of the burning of a storehouse and lot of merchandise alleged to have been covered by a policy of insurance issued by defendant. The defense was, that plaintiff had violated certain terms and conditions contained in the policy. Verdict and judgment in favor of plaintiff, whereupon defendant sued out this writ. The opinion sufficiently sets forth the facts.

Mayer and Ball, and W. M. Rockafeller, for the plaintiff in error.

Charles A. Kutz and W. C. Lawson, and J. B. and S. J. Packer, for the defendants.

By Court, **WOODWARD, J.** Assenting fully to the main proposition of the plaintiff in error, that a policy of insurance, with all its clauses, conditions, and stipulations, is the law of the relation between insurers and the assured, by which their mutual rights and liabilities are to be defined and measured, we are, notwithstanding, unable to construe certain clauses of the policy now before us in the manner suggested on the part of the plaintiff in error.

The provision which forbids an assignment of the policy without the knowledge and assent of the company is immaterial, for Helfenstein made no assignment, and attempted to make none, of his policy.

The fourth condition is said to have been violated by his sale of goods to Herb & Deppin. If he was suing for the value of the goods transferred to those purchasers, the doctrine of *Finley v. Lycoming Mut. Ins. Co.*, 30 Pa. St. 311 [72 Am.

Dec. 705], would be decisive against him; but the goods, in respect of which he claims indemnity, were never sold or transferred to them, or any one else. The policy was on a frame storehouse, situate in the village of Treverton, and a stock of store goods within the same. The storehouse was valued at two thousand dollars, and the merchandise at one thousand dollars.

Some months after the date of the policy, Helfenstein sold to Herb & Deppin all the goods on the lower floor of the store, and admitted them, on the first of October, 1856, to the possession of that part of the storehouse, for the purpose of making merchandise of the goods; but he retained all the goods on the upper floor, and these were proved to exceed in value the one thousand dollars of insurance. The indemnity, he claims, is for the building and the goods on the upper floor. The question is, whether he has forfeited his right to indemnity by failing to give notice of the partial sale to Herb & Deppin. The language of the fourth condition cannot fairly be applied to forbid such a sale, because the policy was on merchandise, which is property not to be kept unchanged, but to be used for traffic and commerce. Assuredly the insurance company did not expect the merchant they were insuring would stop his sales, or report to them every sale he made. If he lost a thousand dollars' worth of goods in that store by fire, he is entitled to indemnity, without regard to any transfer, partial transfer, or change of title "in other goods" which he may have had in the store at the date of the policy. He cannot, and does not, claim for the goods transferred to Herb & Deppin. The transfer to them does not impair his right to indemnity for the residue.

Nor can the words of the fourth clause be so construed as to make the admission of Herb & Deppin to a joint possession of the store building a breach of covenant. Those words do not relate to the possession, but to the title. It is transfer or change of title in the property insured which is forbidden. There was no transfer or change of title of the storehouse or of the goods for which plaintiff now claims indemnity. If the company meant to prevent a change of occupancy or custody, they should have stipulated against it. We see no more violation of this condition, by admitting Herb & Deppin to the possession of the lower floor of the store, than we should have seen in a change of clerks, porters, or watchmen, by Helfenstein. Policies do sometimes forbid a change of tenants with-

out notice, and for a very good reason, but this policy does not. The language of the fourth condition, applicable alike to the real and personal property, relates exclusively to changes of title, and has no reference to the possession. We satisfy those words fully when we hold that, in respect to the goods transferred to Herb & Deppin, Helfenstein could set up no claim, but that in respect to the untransferred portion of the goods and the storehouse, his claim is unimpaired.

Now as to the next point of notice. The sixth condition of the policy binds persons sustaining loss by fire to give notice thereof in writing "forthwith" to the secretary of the company. The fire occurred on Saturday, fourth of October. The same day Helfenstein went to Sanbury to see Gray, the local agent, and through him to give notice to the company of the loss. Gray was not at home, and Helfenstein requested Mr. Dewart to give him notice as soon as he returned. Gray admits that he got the notice on Wednesday next after the fire, and he swore that he communicated it to the secretary by letter immediately. "The secretary came down," says this witness, "a day or two after I sent the letter up. I asked him if he was going to Treverton. He said it was not necessary to go; that I should state to Helfenstein to make out a list of his losses and send it up to the secretary, and it would be paid. I told him he had better put it on paper. He put it on paper, and I handed it to Helfenstein first time he came up that I saw him. The secretary told me he would send Ulman down to give me instructions—that he was a traveling agent. Ulman came here about ten days after the fire. He said he had been in Treverton.

The court submitted it to the jury to say whether the notice was in reasonable time, and they found that it was. The notice is to be forthwith and in writing, and is to be directed to the secretary. Helfenstein started the very day of the fire to communicate notice to the secretary. He had a right to do it through the local agent, and the letter of the agent was a sufficient compliance with that part of the rule which requires the notice to be in writing. But it was the fourth day after the fire that the agent communicated the notice. Was this in time? We held, in *Trask v. State Ins. Co.*, 29 Pa. St. 198 [72 Am. Dec. 622], that eleven days was too long a delay, if not excused by circumstances. And again, in *Inland Ins. Co. v. Stauffer*, 33 Id. 402, that a delay of written notice for eleven days was not excused by a verbal notice to a director and an

agent of the company. In the case of *State Mutual Fire Ins. Co. v. Roland*, MS. of October term, 1860 [not reported], under a policy similar to the present, a written notice by the agent of the company, sent to the secretary four days after the fire, at the instance of the assured, was held sufficient.

The doctrine deducible from these cases is, that notice is a condition precedent to a right of recovery; and where it is stipulated to be given forthwith, the condition imposes upon the assured due diligence under all the circumstances of the case. And this is the rule as given in Angell on Insurance, sec. 231. The assured may be necessarily occupied a day or two after a fire in providing for his family, or for the safety of goods that have been rescued, and which the insurance company would have to pay for if not taken care of. It would be very unreasonable in such cases to construe the stipulation for notice forthwith so sharply as to make his prudent and proper conduct the ground of denying him the stipulated indemnity. In the case of *Edwards v. Baltimore Fire Ins. Co.*, 3 Gill, 176, the policy required the assured forthwith to give notice to the underwriters of any loss. The mail left the place of loss for Baltimore on Monday, Wednesday, and Friday.

The fire took place on Friday night, and the assured did not give notice by mail till the next Wednesday. All the circumstances attending the condition of the property, and the efforts of the assured to collect and preserve it, were left to the jury, to determine whether he was not excused for not mailing his letter in due season. There was a delay of more than five days, and it was not held fatal to the plaintiff's right. We depart from no rulings of our own, and we violate no safe precedents, when we decide that, all things considered, written notice of the plaintiff's loss was given to the secretary within reasonable time after the fire. We are sure the company regarded the plaintiff's conduct as a substantial compliance with his covenant, for the secretary acted upon the notice, not only without cavil or objection, but with an express promise to pay, made through the agent. The thought of taking exceptions to the notice seems not to have entered the secretary's mind so late as the fifth of January, 1857, for on that day we find him writing to Helfenstein that the objection of the company to paying his loss was founded on the transfer of part of his goods. Doubtless that was the objection. Down to that time no objection had been taken to the promptness of the notice; but on the contrary, all the conduct of the secretary

indicated that the notice was satisfactory. We do not put the case upon a waiver, and therefore do not run against the very sharp provision of the sixth clause, which requires every waiver to be evidenced by a writing; but we hold that under the special circumstances of the case, the notice was given in substantial compliance with the condition of the policy. There were no laches to be waived. Starting on the very day of the fire to send notice to the secretary through the company's accredited channel, and causing written notice to go to the secretary within five days after the fire, one of which days was Sunday, was due diligence, was giving written notice forthwith, within the spirit and meaning of the policy. We refer ourselves to the subsequent conduct of the company's agent, not as ratification of an incompetent notice, but as fortifying the above conclusion that the notice was seasonable and sufficient.

The error assigned upon the admission of Gray as a witness was not pressed in argument. There was no ground for it.

The last error assigned was upon the rejection of the assignment of Edward Helfenstein for the benefit of his creditors, made the eighth of February, 1861, more than four years after the loss accrued, and three and more after this suit was brought. The policy, bristling all over with sharp conditions, has one for this occasion, and the company attempt to impale the plaintiff upon it. The condition is, that neither the policy nor any claim thereunder shall be assigned, either prior or subsequent to a loss, except with the consent of the corporation, manifested in writing, and in case of transfer without corporate consent, "this policy shall thereforth be void and of no effect, and any liability of said corporation upon such claim shall thenceforth cease."

However competent it was for the company to make their contract of insurance dependent on such a condition, it was not competent for them to limit the legal effect of a claim thereunder after loss. Helfenstein acquired, by reason of the loss, a legal right to receive so much money at the hands of the company. That chose in action he might assign. If not assigned before suit, the writ was properly issued in his name alone; if assigned after suit, the court will see that the money, when paid by the defendant, goes to the proper party. But the condition appealed to is no defense for the company. If it is applicable to a case circumstanced like this, it is void and null, because opposed to the law of the land.

The judgment is affirmed.

NATURE OF CONTRACT OF INSURANCE: *Morrison v. Tenn. etc. Ins. Co.*, 59 Am. Dec. 299; *Glendale Woolen Co. v. Protection Ins. Co.*, 54 Id. 309. Must be in writing: *Bell v. Western etc. Ins. Co.*, 39 Id. 542. Interpretation of policy of insurance: *Bradley v. Nashville Ins. Co.*, 48 Id. 465; *Daniels v. Hudson River Ins. Co.*, 59 Id. 192; *Morrison's Adm'r v. Ins. Co.*, Id. 304, note; *Holmes v. Charlestown etc. Ins. Co.*, 43 Id. 428; *Grant v. Lexington etc. Ins. Co.*, 61 Id. 74; *Richardson v. Me. Ins. Co.*, 74 Id. 459; *West. Ins. Co. v. Cropper*, 75 Id. 561.

NOTICE OF LOSS, SUFFICIENCY OF: *Trask v. State Ins. Co.*, 72 Am. Dec. 622; *St. Louis Ins. Co. v. Kyle*, 49 Id. 74. Waiver of defect in notice of loss: *Clark v. New England etc. Ins. Co.*, 53 Id. 44; *Worcester Bank v. Hartford Ins. Co.*, 59 Id. 146, note.

NOTICE OF INCREASE OF RISK: *Joyce v. Me. Ins. Co.*, 71 Am. Dec. 536.

ASSIGNMENTS OF INSURANCE POLICIES: *Palmer v. Merrill*, 52 Am. Dec. 782; *N. Y. Life Ins. Co. v. Flack*, 56 Id. 742. Assignment after loss: Id. 749, note; *Walters v. Washington Ins. Co.*, 63 Id. 451. Clause in policy prohibiting assignment thereof without consent, in writing, of the company, does not apply to a deposit of the policy by way of pledge: *Finley v. Lycoming etc. Ins. Co.*, 72 Id. 705.

THE PRINCIPAL CASE IS CITED in *Weisenberger v. Harmony Ins. Co.*, 56 Pa. St. 444, to the point that a policy of insurance is the law of the legal relation between the insurers and insured. It is cited to the point that where a policy contains a condition that notice of a fire should be given to the secretary of the company, in writing, a written notice to the secretary from the local agent, upon information conveyed to him by the assured, is sufficient, in *Beatty v. Lycoming Co. Mut. Ins. Co.*, 66 Id. 16; *Farmers' Ins. Co. v. Taylor*, 73 Id. 353; and is cited in *Insurance Co. v. O'Maley*, 82 Id. 402, to the point that one-sided policies of insurance, "bristling all over with sharp conditions," are not to be commended. In *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136, it is cited to the point that a condition in a policy against assignment after loss is void, as against public policy.

PATTERSON v. ANDERSON.

[40 PENNSYLVANIA STATE, 359.]

COUNT IN CASE IN ACTION AGAINST SHERIFF, alleging misfeasance by which plaintiff lost his debt, is properly joined with count in trover and conversion, against him individually, for goods belonging to plaintiff, and detained by the defendant.

SHERIFF LEVYING UPON GOODS AS PROPERTY OF A, IN WHICH B CLAIMS PARTNERSHIP INTEREST, may, on refusal of plaintiff upon request made, to indemnify him, either return the writ *nulla bona*, or refuse to sell anything but the interest of the defendant in the goods.

SHERIFF IS ANSWERABLE TO PLAINTIFF IN EXECUTION, AS FOR CONVERSION OF GOODS SOLD, where, after sale, he retains possession until payment of bid, and then refuses delivery to purchaser, who was plaintiff in execution, and who offered indemnity; but on the other hand, delivered possession to person claiming to be the partner against whom the purchaser afterwards established his title to the goods.

RECORD OF SUIT IN EQUITY, WHICH IS PART OF RES GESTÆ, IS COMPETENT EVIDENCE for plaintiff upon trial of action, although the defendant in the action was not a party to the proceedings in equity.

ACTION on the case against one Patterson, sheriff of the county, to recover damages for refusing to give plaintiff possession of certain goods and chattels, which he had purchased at sheriff's sale. Verdict and judgment in favor of plaintiff, whereupon defendant sued out writ of error. The opinion states the case.

Charles Shaler and Stephen H. Geyer, for the plaintiff in error.

J. T. Cochran and P. C. Shannon, for the defendant in error.

By Court, **READ, J.** Anderson, holding a judgment against Adam Fehey, issued an execution which was levied on the stock of clothing in the store of Fehey, which was advertised for sale by the sheriff, the plaintiff in error. Before the day of sale, C. Baelz filed a bill in equity against Fehey, to which Anderson was afterwards made a party, alleging a partnership with Fehey, who had permitted suit to be brought against him by Anderson, and judgment obtained, and execution issued and levied on goods of the partnership, for the purpose of selling them, and defrauding the said Baelz.

The court enjoined Anderson from proceeding to sell, which injunction, on the coming in of the answer of Fehey and Anderson, was dissolved by the court on the seventeenth of May, 1857, and the complainant's bill was finally dismissed, there being no evidence to sustain his claim of partnership. Notice was given to the sheriff of Baelz's claim by his counsel, and that if he proceeded to sell the goods he would be held liable by Baelz. Before the advertisement, and also on and before the day of sale, the sheriff demanded indemnity from Anderson, which, if not given, he would only sell the interest of Fehey, and such bond not being tendered or given, he accordingly, on the twenty-ninth day of May, 1856, sold only the interest of Fehey, and Anderson became the purchaser, who paid the sheriff the costs, and the landlord's claim for rent, and receipted for the balance of the purchase-money, applicable to the payment of the debt and interest, and demanded the goods, which were refused. The plaintiff below and his counsel offered to give security to the sheriff, and upon their return from their search for the sureties who are proposed, the counsel was informed that Dr. Baelz had the key to the store.

It appeared in evidence that the sheriff had a watchman in the store; that after the sale the store was locked up by the deputy sheriff, and the key taken to the sheriff's office, where it was refused to Anderson, but was handed over to Baelz (who it afterwards appeared conclusively, had an interest in the goods), who took possession of them, and carried them away.

The sheriff, on Anderson's refusing to give a bond of indemnity, after the notice by Baelz, had a right to decline selling, and might have returned *nulla bona*, or he might have done as he did—sell only the interest of Fehey; and upon Anderson giving him a proper indemnity, might have handed them over to Anderson. But instead of adopting either one of these two courses, he in fact declined taking an indemnity after the sale from Anderson, who was the real owner, and gave them to Baelz, who had no interest whatever in them.

It requires no citation of authorities to show that this course thus deliberately pursued by the sheriff was in direct violation of law, and of his official duty, and was a conversion of the goods sold, for which he was answerable to the plaintiff in the execution.

The record in *Baelz v. Fehey* was properly admitted, and the instructions in regard to it were entirely proper, for it was a necessary part of the history of the case. The second, fifth, and sixth points contained in the third assignment of error were properly refused or declined, and we see no error in the charge of the court as specified in the fourth and fifth assignments of error.

Supposing the demurrer to the joinder of counts in case and trover to have been made at a proper stage of the cause, we see no error in their joinder, for they are both actions on the case; the plea is the same, and the judgment is the same. The demurrer was properly overruled.

Judgment affirmed.

CASE DOES NOT LIE AGAINST SHERIFF FOR NON-ASSAULT OF DEPUTY: *Abbott v. Kimball*, 47 Am. Dec. 708.

WHEN TROVER WILL NOT LIE AGAINST SHERIFF: *Spalding v. Preston*, 50 Am. Dec. 68.

JOINDER OF CAUSES OF ACTION UNDER CODE PRACTICE: *Mooney v. Kennett*, 61 Am. Dec. 576.

HUTCHINSON AND ROURKE v. SCHIMMELFEDER.

[40 PENNSYLVANIA STATE, 396.]

PERSON IS ENTITLED TO RECOVER DAMAGES FOR ANY ENCROACHMENT BY ANOTHER ON HIS LEGAL RIGHTS, to the extent of the injury thereby sustained.

PERSON OWNING LOT LYING BELOW GRADE OF STREET ON WHICH IT FRONTS, in grading up to street, must confine the earth within his own line; and if a person owning an adjoining lot has built a wall and erected a house thereon within his own line, the former can neither build to the wall nor throw earth against it; and if he does so, he is responsible in damages.

ACTION of trespass *quare clausum fregit*, for alleged damages to plaintiff's dwelling-house. The parties to the action owned adjoining lots fronting on a certain street some fifteen feet higher than the adjoining land. Plaintiff erected a dwelling-house on his lot, two stories below the grade of the street, and one story above. Afterwards defendant commenced filling up his lot, and in doing so, the earth necessarily came in contact with the wall of plaintiff's house, and as he alleged, caused the same to spring and crack, which was the trespass complained of. Defendant contended that "he had a right to fill up his lot so as to conform to the grade of the street, doing no willful or unnecessary injury to his neighbor, the plaintiff; that both parties were bound to conform to the grade of the street; that plaintiff had no right to so construct his building as to throw a large extra expense upon his neighbor; and that if the foundation-walls of plaintiff's house had been built of stone, of the ordinary strength and thickness of walls usually built for houses of that class, they would have resisted the ordinary pressure caused by the filling up of defendant's lot, and no injury would have resulted; and to this effect prayed instructions, which were refused." The court charged the jury substantially as stated in the second point in *syllabus*, and also that "if the injury to the walls was not caused by the defendant heaping up the earth against them, plaintiff cannot recover for that injury, but still he would be entitled to recover nominal damages, at least, if defendant covered up for several feet the small slip of ground between his line and the wall of his house." Verdict and judgment for plaintiff, and defendant assigned error.

John Barton, for the plaintiff in error.

R. and S. Woods, for the defendant in error.

By Court, THOMPSON, J. The absolute rights of every Englishman are said, by the author of the commentaries, to consist of three principal or primary articles: the right of personal security, personal liberty, and private property: Bla. Com. 128. These are said by the same author to be irrevocably secured by Magna Charta; by the statute *de confirmatione chartarum*; the *habeas corpus* act; the bill of rights; and lastly, by the act of settlement, after the revolution. With us, these rights are secured by the constitution of the state and United States, and thus being defined, we distinguish constitutional from arbitrary or despotic governments. The right of private property, as defined by the same authority, consists "in the free use, enjoyment, and disposal of all acquisitions, without any control or diminution, save only by the laws of the land: Id. 138. Apply these general principles.

There being no law to interfere with the enjoyment by the plaintiff of his property in the manner which he had chosen to do, his enjoyment could not be interfered with by the defendant on any plea of general or personal benefit; he was bound to yield to neither; to nothing short of the law of the land. This not requiring any concession to the defendant, the latter was without the shadow of right in carting earth and dirt upon his premises. If, therefore, his acts occasioned injury to the plaintiff, it was right to hold him answerable to the extent of the injury. It was no excuse for his trespass that he could not with equal facility, or at the same cost, fill up his lot to the grade of the street, without carting a portion of the material on plaintiff's lot. He was, by a moral as well as legal obligation, bound to use his property so as not to injure that of the plaintiff. If he could not act in accordance with this principle, he could not lawfully act at all. We think the judgment of the court on the points of the defendant were expressed entirely in accordance with the law, and the answers given to the jury faultless.

The judgment is therefore affirmed.

LIABILITY FOR DAMAGES TO OTHERS FROM ACTS DONE ON ONE'S OWN LAND: See *Hay v. Cohoes Co.*, 51 Am. Dec. 282, note.

McCULLY v. CLARKE AND THAW.

[40 PENNSYLVANIA STATE, 399.]

QUESTION OF NEGLIGENCE OUGHT, GENERALLY, TO BE SUBMITTED FOR DETERMINATION OF JURY.

WHERE DUTY IS DEFINED, FAILURE TO PERFORM IT IS OF COURSE NEGLIGENCE, and may be so declared by the court.

JURY ALONE CAN DETERMINE WHAT IS NEGLIGENCE, AND WHETHER PROVED, where the measure of duty is varying, where a higher degree of care is demanded under some circumstances than others, and where both the duty and the extent of performance are to be ascertained as facts.

BURDEN OF PROOF IS UPON PLAINTIFF IN ACTIONS FOR NEGLIGENCE; the law will not presume it for him.

PLAINTIFF IN ACTION FOR NEGLIGENCE IS NOT ENTITLED TO RECOVER, if the loss resulted from mutual negligence; and this is a question for the jury.

WHERE SUBJECT OF INQUIRY IS, WHETHER DEFENDANT HAD USED SUCH DILIGENCE AS PRUDENT AND REASONABLE MEN WOULD HAVE EXERCISED, the court may properly refuse to instruct the jury, that if they believed certain facts to be proved, of which evidence had been given, the defendant was guilty of negligence as matter of law, and that the plaintiff was entitled to recover.

ACTION on the case to recover damages for the destruction by fire of plaintiff's warehouse and contents, alleged to have been occasioned by the default of the defendants in "negligently and willfully" permitting a pile of burning coal to remain for a long time unextinguished upon their premises, immediately adjoining the wall of the warehouse which was destroyed. The testimony was to the effect that plaintiff's property was consumed by fire communicated from the burning coal on defendants' adjoining premises, as alleged. Plaintiff also offered evidence to show that his warehouse was substantially built, with cellar and other independent walls throughout, and that the fire commenced in the ends of the timbers inserted in that part of defendants' wall against which the mass of burning coal was piled; and offered also to prove that the application of water, as shown by the testimony, would be only to intensify the heat; that the only feasible means of extinguishing it would have been by its removal. The defense was, that the fire did not originate from the burning of the coal, and that defendants were not guilty of negligence; and that if there was any danger of injury to plaintiff's property from the cause assigned, plaintiff was guilty of gross negligence in not making every effort to prevent the injury, and in not giving notice to defendants. Under the facts appearing from the evidence, the court declined plaintiff's request to charge, "as matter of law.

either that there was or was not negligence on the part of either the plaintiff or defendants;" and gave instruction, that "whether either or both the parties were or were not guilty of negligence, are questions of fact for the determination of the jury, from all the evidence in the case." Verdict and judgment for defendants, and plaintiff assigned error.

R. Woods, for the plaintiff.

A. W. Loomis and C. B. Smith, for the defendants.

By Court, STRONG, J. No complaint is made of the instruction given to the jury in this case. None could be with any shadow of reason. The charge was a clear, accurate, and comprehensive statement of the principles of law applicable to the facts of which evidence had been given. It is not alleged that it contained anything erroneous. The complaint here is, that the learned judge did not say more; that he did not take the facts away from the jury, and instruct as matter of law that the plaintiff was entitled to recover.

The action was brought for negligence. The point of the accusation was, that the defendants had so negligently kept and continued a certain pile of coal which had taken fire, and so wrongfully and negligently failed to extinguish the fire, that the warehouse of the plaintiff, with its contents, had been ignited and destroyed. Whether the defendants had been guilty of the negligence charged was therefore the principal subject of inquiry; in other words, whether they had exercised such care and diligence to prevent injury to the property of the plaintiff as a prudent and reasonable man, under the circumstances, would exercise. Now, it is plain that what is such a measure of care is a question peculiarly for a jury. A higher degree is doubtless demanded under some circumstances than under others. It varies with the danger. And when the standard shifts with the circumstances of the case, it is in its very nature incapable of being determined as a matter of law, and must be submitted to the jury. There are, it is true, some cases in which a court can determine that omissions constitute negligence. They are those in which the precise measure of duty is determinate, the same under all circumstances. When the duty is defined, a failure to perform it is of course negligence, and may be so declared by the court. But where the measure of duty is not unvarying, where a higher degree of care is demanded under some circumstances than under others, where both the duty and the extent of performance are

to be ascertained as facts, a jury alone can determine what is negligence, and whether it has been proved. Such was this case. The question was not alone what the defendants had done, or left undone, but, in addition, what a prudent and reasonable man would ordinarily have done under the circumstances. Neither of these questions could the court solve. When, therefore, the court was asked to instruct the jury that if they believed certain facts were proved, of which evidence had been given, the defendants were guilty of negligence, and the plaintiff was entitled to recover, the instruction was properly refused. It could not have been given without determining, as matter of law, what care and caution a prudent and reasonable man would have exercised in circumstances similar to those in which the defendants were placed. The points proposed to the court assumed that the defendants were under obligation completely to extinguish the fire in a coal-pile within a designated time. They did not purpose to submit to the jury even so much as whether it could have been done, much less whether every reasonable effort had not been made to extinguish it. Nor were the facts which the court was called on to declare conclusive proof of negligence, and entitling the plaintiff to recover, all the material facts of which there was evidence in the case. There were others of a qualifying nature, important to the inquiry, whether the defendants had been culpably negligent. Without considering these other facts, the court must have taken but a one-sided view of the case. Besides all this, the court could not have directed a verdict for the plaintiff, as requested, without deciding that there was no evidence at all of concurring negligence on the part of the plaintiff. But even if the loss of the plaintiff was occasioned by want of due caution on the part of the defendants, the case was not destitute of evidence that the plaintiff's negligence contributed to the loss.

For similar reasons, the court was right in declining to charge the jury that certain facts enumerated, even though not constituting negligence in law, threw upon the defendants the burden of proof in the case, and that the jury must be satisfied that the fire could not have been extinguished within a designated time, or the plaintiff would be entitled to a verdict. The instruction asked for assumed that it was for the court to determine precisely what was due diligence and caution, and to rule that nothing less than a complete extinguishment of the fire in a specified time, if possible, would bring

their conduct up to the standard by which prudent and reasonable men are guided. This point, also, as did the others, ignored pertinent and important facts in evidence, which must have been considered in determining whether there was negligence at all, and if affirmed, it might have given the plaintiff a verdict, even though the plaintiff's own negligence may have concurred in causing his loss. In actions for negligence the burden of proof is upon the plaintiff. The law will not presume it for him. And in cases like this, where all the evidence must be considered in order to ascertain whether negligence existed, it is a mistake to suppose that a court may be required to single out some of the facts proved, and declare that they remove the burden of proof from the shoulders of the plaintiff and cast it on the defendant. That can only be done where a court can determine what constitutes guilt. It is the province of the jury to balance the probabilities and determine where the preponderance lies. The case relied upon by the plaintiff in error, *Piggot v. Eastern Counties R'y Co.*, 3 Com. B. 229, S. C., 54 Eng. Com. L. 228, is in perfect harmony with these doctrines. In that case, the defendants ran a locomotive, the sparks from which set fire to the property of the plaintiff. Using a dangerous agent, the law required of them to adopt such precautions as might reasonably prevent damage to the property of others. Some precaution was a duty. They had no right to run their locomotive without it. Failure to adopt some precaution was therefore failure to discharge a defined duty, and was negligence. In such a case, the court might well say, as was said, that a fire caused by running the engine, without any evidence of precaution, established a *prima facie* case of negligence. Even this, however, was not laid down as matter of law to the jury. It was only said by one of the judges, in commenting on the evidence, and in reply to a rule for a new trial, on the ground that the verdict was against the weight of the evidence. It was therefore no more than an assertion that the jury might have drawn the inference of negligence from the facts that a locomotive had kindled a fire, and that there had been no precaution. That was a very different case from the present. Even if the court might in that case have declared the effect of the evidence, it must have been because the duty of the defendants was unvarying and well defined by the law. Here the standard of duty was to be found as a fact, as well as the measure of its performance, and there was evidence of earnest, continued, and apparently suc-

cessful efforts to extinguish the fire in the coal. This disposes of all the assigned errors, except the fifth and eighth. Of them we need only say that they were not insisted on in the argument, and we have not been able to discover that they point to any error committed.

Judgment affirmed.

NEGLIGENCE DEFINED: *Mad River etc. R. R. Co. v. Barber*, 67 Am. Dec. 312; *Norris v. Litchfield*, 69 Id. 546, 551, note; *Danner v. South Carolina R. R. Co.*, 55 Id. 678; *Baltimore etc. R. R. Co. v. Woodruff*, 59 Id. 72.

WHETHER NEGLIGENCE EXISTS IS ORDINARILY QUESTION OF FACT AT COMMON LAW: *Sawyer v. Eastern Steamboat Co.*, 74 Am. Dec. 463; compare *Herring v. Wilmington etc. R. R. Co.*, 51 Id. 395; *Beatty v. Gilmore*, 55 Id. 514; *Trow v. Vt. Cent. R. R. Co.*, 58 Id. 191.

BURDEN OF PROOF IN CASES OF NEGLIGENCE: See *Burroughs v. Housatonic R. R. Co.*, 38 Am. Dec. 71, note; *Johnson v. Hudson River R. R. Co.*, 75 Id. 383.

THE PRINCIPAL CASE IS CITED to the point that ordinary care is such as a prudent and reasonable man under the circumstances would exercise, in *Pennsylvania R. R. Co. v. McTighe*, 46 Pa. St. 320; to the point that it is the province of the jury, in action for negligence, to balance the probabilities and determine where the preponderance lies, in *Lackawanna etc. R. R. Co. v. Doak*, 52 Id. 381, 390; to the point that where both the duty and the extent of performance are to be ascertained as facts, a jury alone can determine what is negligence and whether it has been proved, in *Pennsylvania R. R. Co. v. Barnett*, 59 Id. 264; *Pennsylvania Canal Co. v. Bentley*, 66 Id. 34; *West Chester etc. R. R. Co. v. McElwoe*, 67 Id. 315; *Crissey v. Hestonville etc. R'y Co.*, 75 Id. 86; *Phila. City Pass. R'y Co. v. Hassard*, Id. 377; to the point that, as a general rule, what is negligence is a question for the jury, when the measure of duty is ordinary and reasonable care, in *Phila. City Pass. R'y Co. v. Hassard*, Id. 376; to the point that when the duty is defined, a failure to perform it is of course negligence, and may be so declared by the court, in *Empire Transp. Co. v. Wamsutta Oil Co.*, 63 Id. 17; *Pennsylvania Canal Co. v. Bentley*, 66 Id. 34; *Phila. etc. R. R. Co. v. Stinger*, 78 Id. 225; *Schum v. Pennsylvania R. R. Co.*, 107 Id. 12; to the point that certain facts, when established, amount to negligence *per se*, in *Hoag v. Lake Shore etc. R. R. Co.*, 85 Id. 297; *Nagle v. Allegheny Valley R. R. Co.*, 88 Id. 38; to the point that negligence may consist as well in not doing the thing which ought to be done as in doing that which ought not to be done, when in either case it has caused loss and damage to another, in *Fritch v. City of Allegheny*, 91 Id. 229; and to the point that in actions for negligence the burden of proving the negligence is on the plaintiff, in *Baker v. Fehr*, 97 Id. 71; *Federal St. etc. R'y Co. v. Gibson*, 96 Id. 85.

SINCLAIR v. HEALY.

[40 PENNSYLVANIA STATE, 417.]

BONA FIDE PURCHASER OF CHATTEL, FOR VALUABLE CONSIDERATION, WITHOUT NOTICE, FROM FRAUDULENT VENDER, takes a title clear of the fraud, whether it be actual or legal.

ACTION of trespass, by plaintiff against defendant, sheriff of Elk county, to recover damages for levying on and selling two yoke of oxen, under writ of execution, at suit of certain plaintiffs against a certain firm, defendants. The oxen were seized and sold as the property of one Cobb, a member of said firm. They had been bought and paid for by the plaintiff, before the execution issued, from an alleged fraudulent vendee of Cobb, the execution debtor. The court below directed the jury to determine, under all the evidence, whether the sale made by Cobb was not fraudulent, and that if they should find it was not, then their verdict should be for the plaintiff; but if they should find that the sale was fraudulent, their verdict should be for the defendant. Verdict and judgment for defendant, and plaintiff assigned error.

Souther and Willis, for the plaintiff.

Defendant's counsel furnished no printed argument.

By Court, READ, J. A *bona fide* purchaser of a chattel, for a valuable consideration, and without notice, from a fraudulent vendee, takes a title clear of the fraud, whether it be actual or legal. The present case, as presented by the plaintiff in error's paper-book, appears to come within this category, and the error of the court was in instructing the jury upon only one branch of the proposition, that if the sale by the alleged fraudulent vendor to the alleged fraudulent vendee was fraudulent, then their verdict should be for the defendant, entirely ignoring the question whether the plaintiff purchased with a knowledge of the fraud, or not. Upon that point, the court should have instructed the jury upon the law as we have stated it, and submitted the facts to them under such ruling, for their decision. This error runs through the whole charge of the court.

Judgment reversed, and *venire de novo* awarded.

TITLE OF BONA FIDE PURCHASER FOR VALUE, HOW PROTECTED: *Howell v. Ashmore*, 57 Am. Dec. 371; *Crump v. Black*, 51 Id. 422. *Bona fide* purchaser from fraudulent purchaser gets good title as against the party defrauded: *Wiggin v. Sweet*, 39 Id. 716, note.

BONA FIDE PURCHASER FROM ONE HAVING NO TITLE CAN OBTAIN NO TITLE: *Williamson v. Williamson*, 41 Am. Dec. 636; *Barnes v. Meeds*, 49 Id. 390; *Bailey v. Harris*, 74 Id. 312; *Carmichael v. Buck*, 10 Rich. L. 226.

BONA FIDE PURCHASER OF STOLEN GOODS IS LIABLE IN TROVER to the owner for them, if he has sold them subsequently: *Courtis v. Case*, 76 Am. Dec. 174.

WHAT CONSTITUTES PERSON BONA FIDE PURCHASER: *Warner v. Whittaker*, 72 Am. Dec. 65.

HEIL AND LAUER'S APPEAL.

[40 PENNSYLVANIA STATE, 453.]

PRINCIPLE OF IDEM SONANS IS IN GENERAL APPLICABLE TO NAMES SIMILARLY PRONOUNCED, but does not apply to the entry of the defendant's name on the judgment docket, where the name is differently spelled, as, for instance, Joest for Yoest.

HOLDER OF JUDGMENT SHOULD SEE THAT JUDGMENT WAS PROPERLY ENTERED, so as to furnish to the eye of purchasers and subsequent incumbrancers that record notice which the act of assembly contemplates; and being entered in the wrong initial, it is not such notice.

CERTIORARI to common pleas of Westmoreland county. Appeal from decree of court below confirming report of the auditor appointed to distribute the proceeds of the sale of the real estate of George P. Yoest. Appellants' judgment against him in the name of George P. Joest was not permitted by the auditor to participate in such distribution, as against subsequent liens properly entered, although the identity of the party was admitted. The court below affirmed the distribution made by the auditor, and appellants assigned the decree of the court for error.

By Court, **STRONG, J.** We think the auditor and the court below were right in refusing to permit the judgment of the appellants to participate in the distribution of the money in court. The fund was raised out of the sale of the real estate of George P. Yoest, and the judgment of the appellants was entered against George P. Joest. It is true that George P. Yoest and George P. Joest are the same person, and that in the German language the letters Y and J are pronounced alike. But in the distribution of the proceeds of a sheriff's sale, beside the question of the identity of the debtor, there is one of record notice. Upon this second question, no light is thrown by the fact that the name of the debtor, though spelled with different capitals, is the same in sound. The act of assembly, which requires that judgment dockets and indexes shall be kept,

provides for notice to the eye, not to the ear. It contemplates that the dockets shall be kept in English, and it does not impose upon any one who searches the duty of inquiring whether some other letters may not spell the name of the debtor in another language. It was the duty of the appellants to see that their judgment was properly entered: *Hood v. Reynolds*, 7 Watts & S. 406—entered so as to furnish to the eye of purchasers, and subsequent incumbrancers, that record notice which the act of assembly contemplates. We do not think that the legislature intended that a purchaser, or incumbrancer, in searching for a name, the initial letter of which is Y should be under obligation to examine the index through the letters Y and J. We must so hold, or the judgment dockets and indexes would be shorn of their value, and the statutory purpose defeated. There are many sounds in our language which are indicated by different letters in other languages. This is true, both of vowels and consonants. Thus, in the Spanish language, the initial J has the sound of H. Must the purchaser search under the letters J and H?

The decree of the court of common pleas is affirmed.

DOCTRINE OF IDEM SONANS DISCUSSED: *Schooler v. Ashurst*, 13 Am. Dec. 233. Names "Penryn" and "Pennyryne" should be regarded as *idem sonans*: *Elliott's Lessee v. Knott*, 74 Id. 519.

JUDGMENT MAY BE AMENDED SO AS TO MAKE NAMES OF PARTIES THEREIN conform to those of the writ and declaration: *Smith v. Redue*, 44 Am. Dec. 429.

GRAHAM AND MELLOR v. MCCREARY.

[40 PENNSYLVANIA STATE, 515.]

VENDOR OF PERSONAL PROPERTY, THROUGH WHOM BOTH PARTIES CLAIM TITLE THERETO, is competent witness for plaintiff in an action against the sheriff for seizing and selling the property under an execution against the vendor.

EVIDENCE IN ABATEMENT OF DAMAGES that part of proceeds of execution was applied in payment of plaintiff's rent in arrear is not admissible in an action of trespass for a wrongful levy upon personal property.

RECORD SHOULD SHOW BILL OF EXCEPTIONS SEALED TO DECISION OF COURT BELOW, otherwise the objection will be regarded as waived.

SALE OF CHATTEL, ATTENDED WITH DELIVERY AND TRANSFER OF POSSESSION, which was retained for several weeks, is not a fraudulent transaction in law, and if the sale was collusive, it is for the jury to determine it as a fraud in fact.

ACTION of trespass against the sheriff, and one Mellor, for selling under execution, at the suit of Mellor, a piano, as the

property of plaintiff's son, one Dr. McCreary. McCreary purchased the piano in question from Mellor, and afterward sold it to plaintiff, who resided with him, in part satisfaction of her claim against him for money lent. He then moved to another place, intending to remain, leaving the piano in plaintiff's exclusive possession. After some weeks he returned, and the plaintiff again became a resident with him, the piano remaining in the house, occasionally used by his wife, with plaintiff's permission. Mellor obtained judgment against McCreary for the price of the piano, and instructed the sheriff to levy thereon, which he did. It was subsequently sold, and part of the proceeds, on distribution, was given to the landlord for rent in arrear of the house in which plaintiff and son resided. On the trial, defendants objected to McCreary being called as a witness to prove that he had sold the property to plaintiff before the levy, and the court overruled the objection. They also offered in evidence the auditor's report distributing the proceeds of sale, which was rejected by the court. Under the court's instructions to the jury, plaintiff had a verdict and judgment, and defendants assigned error.

J. W. F. White, for the plaintiff in error.

Thomas Ewing, for the defendants in error.

By Court, THOMPSON, J. If the contest in this case had turned on the question of title in the witness when he sold the piano, the objection to his competency would have been quite another thing, and might have been successful: 1 Greenl. Ev., secs. 397, 398; 2 Phill. Ev. 894; *Search's Appeal*, 13 Pa. St. 111. But this was not the point in contest. Both parties claimed through him, and thus affirmed his title. He was not called, therefore, to support his title; but to prove a sale of the property, a fact necessary to the plaintiff, and which the defendants denied. They did not rely on the absence of title in the witness, but only that his transfer to the plaintiff was fraudulent either in law or fact. If it were either, the sale surely did not imply a guaranty on his part that such a transaction should be effectual to vest title in his participant in the fraud. The defendants alleged that it was a collusive transaction to defraud creditors, and in that aspect they could not apply a doctrine which a vendee might do if the title failed by reason of a fraud in the sale. But the question is settled by the case of *Miller v. Fitch*, 7 Watts & S. 366, in which it is distinctly ruled, in a case like the present, that

where the objection was the same, that the vendee was a competent witness.

Being admitted, the witness, if believed, proved a sale and the delivery of possession of the piano to the plaintiff, his removal from the county immediately thereafter with a view to a permanent residence, and the exclusive possession of his mother, who continued to live in this county until his return. It is true that he further testifies that after a few weeks, not succeeding as he expected, he and family returned to this county. After this his mother became again a resident with him, and the piano was kept at his house, and used by his wife, with the permission of his mother. From these facts, a court could not pronounce the transaction a fraud in law. There was in appearance, at least, a substantial delivery, and transfer of the possession, and so retained exclusively for four or five weeks. This length of time was thought to be sufficient in *Brady v. Haines*, 18 Pa. St. 113, when there was nothing to show it to have been a delivery merely *pro forma*, to prevent the operation of the doctrine in cases of fraud in law from applying, to turn it into a question of fact as to whether the transaction was collusive or not; and see *Smith's Lead. Cas.*, 5th Am. ed., 73. The court dealt with the case accurately in this aspect, and we see no error in it.

No bill of exceptions seems to have been sealed to the rejection of the auditor's report, and we cannot notice this assignment of error. It is quite apparent that if there had been, it would not have availed the defendants. It was not evidence in any point of view which was claimed for it.

Judgment affirmed.

EVIDENCE OF TITLE IN TRESPASS QUARE CLAUSUM FREGIT: *Bivins v. McElroy*, 52 Am. Dec. 258; *Heath v. Williams*, 43 Id. 265; *Hunter v. Hatton*, 45 Id. 117; *Pomroy v. Parmlee*, 74 Id. 328.

IN SALE OF PERSONAL CHATTEL, DELIVERY OF POSSESSION IS NECESSARY, as against all except the vendor: *Call v. Gray*, 75 Am. Dec. 141. Retention of possession by vendor, after an absolute sale, is *prima facie* evidence of fraud: *Fleming v. Townsend*, 50 Id. 318; *Peck v. Land*, 46 Id. 368; *Shaddon v. Knott*, 58 Id. 63; *Mason v. Bond*, 33 Id. 243.

THE PRINCIPAL CASE IS CITED in *Steeboagon v. Jeffries*, 44 Pa. St. 412, as having its foundation in the doctrine that an actual change of possession, when it can take place, or something equivalent thereto, must be shown to make the transfer of chattels good as against creditors of the vendor. It is cited in *Barr v. Reitz*, 53 Id. 257, as a case, among others mentioned, which allows the force of certain circumstances which take away any false color or appearance of ownership remaining in the vendor of personal property; and

is cited in the same case as authority for the proposition that "it is not the mere place the property occupies which gives color of possession to the former owner, but it is the connection the place itself has with the owner, indicating his apparent control over it:" *Id.* 258.

KENNEDY v. HOUSE.

[41 PENNSYLVANIA STATE, 89.]

CLAIM OF MECHANIC'S LIEN IS NOT VOID because it does not accurately describe the size of the building against which it is filed. If there is enough in the description of the locality and peculiarities of the building to point it out with reasonable certainty, this is sufficient.

IDENTITY OF BUILDING, WHICH IS ATTEMPTED TO BE DESCRIBED IN CLAIM for a mechanic's lien, is to be left to the jury, under a statute which provides that the claim filed shall set forth "the locality of the building, and the size and number of the stories of the same, or such other matters of description as shall be sufficient to identify the same."

THIS was a *scire facias sur* mechanic's lien, in which House and Horton, partners, were plaintiffs, and P. Kennedy, the owner of the building against which the lien was filed, and J. Carnahan, the contractor therein, were defendants. The premises were described as "all that certain two-story brick house or building, with a finished basement, situated in Temperanceville, in the township of Chartiers, county aforesaid, on the Steubenville turnpike road, containing in front on said turnpike road sixteen feet, and in depth sixteen feet, and the lot or piece of ground and curtilage appurtenant to said building." Judgment was for plaintiffs. Defendants prosecute this writ of error. The other facts are sufficiently stated in the opinion.

Thomas McConnell, for the plaintiffs in error.

E. P. Jones, for the defendants in error.

By Court, **STRONG, J.** All the errors assigned present but one question, which is, whether the court should have instructed the jury that the claim filed was no lien, and void for uncertainty, or error in the description of the building and lot of ground upon which it was erected. The claim specifies the county, the township, and the village in which the property is situated, the road upon which it fronts, the owners of the adjoining properties, the material of which the building is constructed, the number of stories, with the fact that it had a finished basement, and the correct width of the building on the road, to wit, sixteen feet, but it describes its depth as six-

teen feet, when in fact it is thirty-two feet. The court refused to charge the jury that this was such a misdescription as to preclude the plaintiffs from a recovery, and submitted the question of identity to the jury. In this we discover no error. The act of assembly, which gives to a mechanic and material-man a lien, requires that the claim filed shall set forth "the locality of the building, and the size and number of the stories of the same, or such other matters of description as shall be sufficient to identify the same." The object of this requisition is to enable owners, and especially purchasers and incumbrancers, to identify the building, and to inform themselves of the liens against it. A claim is not necessarily void because it does not accurately describe the size of the building. If there be enough in the description of the locality, and other peculiarities of the building, to identify it, to point it out with reasonable certainty, with certainty to a common intent, the statutory requisition is sufficiently complied with. Thus the mechanic's lien laws have ever been construed. No doubt a description may be so defective or erroneous as to enable a court to say that it can by no possibility identify the building, and give notice to purchasers and creditors. Such was the description in *Washburn v. Russel*, 1 Pa. St. 499, of "a tract of land in Clarion county, on the waters of the Clarion river, situate on the east side of the river." But a mere mistake in the description will not invalidate the claim, if there still be enough to identify the property, and prevent mistakes on the part of purchasers and creditors. So it was ruled in *Ewing v. Barras*, 4 Watts & S. 467; and whether the description in the claim filed corresponds nearly enough with the actual facts to identify the property must ordinarily be referred to the jury. The locality is obviously the most important. When that is fixed, other matters of description are of comparatively minor consequence. But even in regard to locality, there is great reluctance to declare a claim invalid for mere loose description. Even in such cases, it is held that the jury are generally to determine whether the property is in truth designated: See *Harker v. Conrad*, 12 Serg. & R. 301 [14 Am. Dec. 691]; *Springer v. Keyser*, 6 Whart. 187; *Shaw v. Barnes*, 5 Pa. St. 20; *Knabb's Appeal*, 10 Id. 187. Such were the principles upon which the learned judge of the district court tried this cause, and we concur with him in his refusal to charge the jury as he was requested.

The judgment is affirmed.

MECHANICS' LIENS ARE SET ASIDE RELUCTANTLY BY COURTS.—If the claim of lien is totally defective, the court will set it aside, but if not totally defective in giving information to purchasers and others searching for incumbrances, such as will direct them to the right place, the question whether the premises are described to a certainty to a common intent will be submitted to a jury, for the court cannot take judicial cognizance of the circumstances of the neighborhood, which is absolutely necessary to enable it to decide such a question: *McClintock v. Rush*, 63 Pa. St. 205, citing the principal case.

ONE WHO CLAIMS BENEFIT OF MECHANIC'S LIEN must show that he has complied with the statute relating thereto: *Farmers' Bank v. Winslow*, 74 Am. Dec. 740, note 742.

HUTCHINSON v. M. & M. BANK OF WHEELING.

[41 PENNSYLVANIA STATE, 42.]

TROVER LIES TO RECOVER PROPERTY APPROPRIATED BY THEFT, as well as that taken by fraudulent means or by trespass.

PRIVATE ACTION OF TROVER IS SUSPENDED until the public prosecution for the offense has been duly conducted and ended, but the private wrong is not merged in the public wrong, nor does the public prosecution supersede the private action.

IF ACTION OF TROVER IS COMMENCED WITHIN PERIOD OF LIMITATION, after the conclusion of the public prosecution for a theft, it will not be barred by the statute; the action being suspended until that time, the statute of limitation cannot begin to run against the action until the disability is removed.

In error. This was an action of trover by the Merchants' and Mechanics' Bank of Wheeling, against the plaintiff in error Hutchinson, for seven thousand dollars, in notes of that bank. In 1850, said bank sent by one J. W. Sweeney said bank bills to the Mineral Bank of Maryland, in Cumberland, in that state. They were put up in a package, and placed by Sweeney in his trunk. Sweeney made the journey on a stage, and while on its way to its destination the straps to the boot of the stage were cut, and several trunks were stolen out of the boot, among which was Sweeney's trunk. In 1852, plaintiff in error Hutchinson was arrested for the theft, tried and acquitted. Within the period prescribed by the statute of limitations, from the date of this acquittal, the action was commenced; but if computed from the time of the theft, the statute would bar the action. The defendant pleaded that the action was barred by the statute of limitations. At the trial, the loss and identity of the bills were proved, also that plaintiff in error Hutchinson took them, etc. The court was asked to instruct the jury that the public prosecution barred the private action, and that the action was barred by the statute of limitations. The court

refused these, but instructed that trover would lie, that the action was not barred, and that the public prosecution did not supersede the private action. Judgment was for plaintiff, and these instructions are assigned as error.

Fuller and Collins, for the plaintiff in error.

D. Kaine, for the defendant in error.

By Court, LOWRIE, C. J. Trover, being the proper remedy for the wrongful conversion or appropriation of the property of another, undoubtedly includes appropriations by theft, as well as by fraud and trespass, unless there is some special rule of public policy that excludes them. There is none such; but it has often been held, for the sake of public justice, that the private action of trover is suspended until the public prosecution for the offense has been duly conducted and ended: *Golithly v. Reynolds*, Lofft. 88; *Nash v. Cox*, Id. 601; *Regina v. Commissioners*, 15 Q. B. 566; *Speer v. Humphrey*, 2 Ad. & El. 495; *Gimson v. Woodful*, 2 Car. & P. 41; *De la Chaumette v. Bank of England*, 9 Barn. & Cress. 208. There are some special exceptions to this, which we need not now explain: *Easley v. Crockford*, 10 Bing. 243; *Beckwith v. Corral*, 3 Id. 444. It is thus that the law is generally understood in this state, when the thief can be ascertained and found; and on this rule the case was rightly tried. The rule of course suspended the statute of limitations until the claims of the public were satisfied by the termination of the criminal prosecution; and this suit was within six years after that, and therefore in time.

The private wrong was not merged in the public one, nor is the public prosecution intended to supersede the private action. The purposes are entirely different. The person wronged is not chargeable with the conduct of the prosecution, and therefore not affected by an acquittal. Even a conviction and sentence do not discharge his right of action, for a pardon may make it ineffectual for restitution. We do not discover any irregularities or inaccuracies in the trial, to the injury of the defendant below.

Judgment affirmed.

THE PRINCIPAL CASE IS DISTINGUISHED in *Milne's Appeal*, 99 Pa. St. 491.

MEASURE OF DAMAGES IN TROVER is the value of the property. In case of notes, bank stock, etc., it is *prima facie* the face value of the instrument: *Robbins v. Packard*, 76 Am. Dec. 134; *Connor v. Hillier*, 73 Id. 105, and note 106; *Bachstoss v. Stahler's Adm'rs*, 75 Id. 593, note 598; see also *Foreyth v. Wells*, *post*, p. 617, note 620.

BROWN v. McFARLAND'S EXECUTORS.

[41 PENNSYLVANIA STATE, 129.]

SURVIVING PARTNERS ARE ENTITLED TO CLOSE UP PARTNERSHIP BUSINESS after the death of a member of the firm, but are not entitled to charge for their services in so doing.

EXECUTOR OF DECEASED PARTNER CANNOT EMPLOY SURVIVING PARTNER to wind up the affairs of the firm at a fixed compensation, unless he is expressly authorized to do so by his testator's will.

TAUTOLOGY IN LEGAL DOCUMENTS commented on and discussed.

NOTE MADE UNDER FOLLOWING CIRCUMSTANCES was held to be the property of the firm, and not chargeable to the individual member who signed it, viz.: G. B. McFarland, the testator of defendant in error, and Brown, the plaintiff in error, were partners in a store under the firm name of McFarland & Co., and they were partners with one Caldwell in a smelting furnace, under the name of Phoenix Furnace. The latter firm owed the former firm one thousand two hundred dollars, which was represented by an individual note of McFarland, drawn in favor of Brown. Brown claimed a right to charge the whole of this note against McFarland's estate, but the claim was disallowed.

IN error. This was an action of account rendered against Brown, the plaintiff in error, and one Caldwell, who were the surviving partners of plaintiff's testator, in a firm known as the Phoenix Furnace. McFarland, the testator, was also a partner with said Brown, under the name of G. B. McFarland & Co. McFarland died in 1851, and in his will he authorized his executor to co-operate with his partners in carrying on the business of the Phoenix Furnace in such manner as shall be deemed to the best interests of the firm, including the sale of the real and personal property of said firm. In pursuance of this authority, the executor agreed with said surviving partners in writing to transfer the property of the Phoenix Furnace to them, until the stock of goods on hand should be worked up, or until the property was sold or otherwise disposed of, to be carried on by them in their own names; they to keep an account of the business in the usual way, and to account for the profits and proceeds thereof after paying all expenses, costs, charges, and services, and then providing how the surplus should be disposed of. Phoenix Furnace was indebted to G. B. McFarland & Co., and to pay part of that debt, G. B. McFarland made, executed, and delivered his promissory note for one thousand two hundred dollars, payable to the order of Brown, the plaintiff in error, on account of the latter firm. Brown claimed that this whole note should be charged to the estate of McFarland, but only half of it was so charged, on the ground that McFarland as a member of the said latter

firm owned the other half. To expedite the hearing of the case, the parties entered into stipulations, which are referred to in the opinion, but as no legal principle is decided which grows out of the agreement, it is omitted. Judgment was for defendant in error, and this writ is sued out by Brown, under protest on the part of Caldwell. The other facts are stated in the opinion.

S. N. Purviance, for the plaintiff in error.

Golder and Fulton, for the defendant in error.

By Court, **WOODWARD, J.** As surviving partners, Brown and Caldwell would have been entitled, after McFarland's death, to work up the stock on hand at the Phoenix Furnace, and to close the business of the partnership; but, for this service, would have had no right to charge the estate of their deceased partner with anything more than their necessary outlay of expenses. As compensation for their personal services, they were not entitled to charge: *Beatty v. Wray*, 19 Pa. St. 518 [57 Am. Dec. 677]. Nor does the will of McFarland and the agreement of his executor, made in pursuance thereof, alter the rule of law applicable to this case. The agreement does indeed provide that they are to account only for profits after paying "all expenses, costs, charges, and services." This last word is supposed to authorize and justify Mr. Brown's charge of one thousand seven hundred and ninety-two dollars and fifty cents for his attention to the furnace. The auditors thought not. They did not deny that the word "services" in the agreement might be construed to include Brown's attentions, but they denied the right of the executor to make any such contract. They said the will authorized no agreement to pay for a partner's services in closing up the concern, and the executor had no power, *virtute officii*, to subject the estate to such a charge.

We find ourselves inclined to agree with the auditors in this view. They have not only rendered very good reasons for the faith that was in them, but they have examined the arguments and authorities so satisfactorily, on which the plaintiff in error's counsel rely, as to save us much trouble. We agree with them that there is nothing to take this case out of the ordinary rule of law, and that if the executor's agreement was designed to do so, it was void for defect of authority. But we incline to the opinion that the word "services" pointed to the employment of a manager. The furnace was conducted by

Martin B. Wilson as manager, and for his services Mr. Brown was allowed a full credit. There was a clerk also, and other employees, and although the cost of all these might well enough have been considered as covered by the words "expenses and charges," yet it is not strange that the other word "services" should have been employed as referring to the same subject. Tautology, which is one of the commonest vices of American style, is thought to add strength to agreements and other legal documents. This very agreement affords another instance of the same sort. Having treated for all the "real and personal property" of the furnace, the parties put themselves to the trouble of interlining and noting in the attestation the words "assets and chattels," as if these words might possibly embrace something omitted by the words "real and personal property." In like manner, we suppose when they thought of the outlays necessary for carrying on the furnace, they called them by the triple title of costs, expenses, and charges, but did not mean by either or all of the words to compensate the surviving partners for time and trouble in attending to partnership property, which the deceased partner had attended to in his life-time, without charge for his services.

The next material point of controversy is the note of June 16, 1851, for one thousand two hundred dollars, signed by G. B. McFarland, and made payable to the order of James E. Brown, on account of George B. McFarland & Co., in part of debt due to that firm by the Phoenix Furnace. As I understand this matter, it was thus: McFarland and Brown were partners in the Rural Village Store, under the name of G. B. McFarland & Co. McFarland, Brown, and Caldwell, were partners in Phoenix Furnace, under the name of G. B. McFarland. Phoenix Furnace owed Rural Village a debt, one thousand two hundred dollars of which was represented by this note. Brown claimed to charge the whole amount of the note against the estate of McFarland. The auditors allowed him but half of it. Nothing can be more plain than that, as between Brown and McFarland, the note belonged to them jointly, and that in settling their accounts, Brown was entitled to no more than the auditors allowed him.

The other items excepted to were not made the subject of remark in the argument, and we leave them as they stand in the auditor's report.

We can perceive no ground for the complaint that the auditors exceeded their powers. The agreement of January 24,

1860, was founded on the inconveniences which are always experienced in conducting actions of account rendered through all stages of their legal progress, and seems to have been intended to vest in the auditors plenary powers to deal with all questions that had arisen, and to report accounts in accordance with their several decisions. They seem not to have transcended the limits prescribed by the parties, and we think the court did right in confirming their report.

The decree is affirmed.

PARTNER IS NOT ENTITLED TO COMPENSATION for closing up the business: *Gyger's Appeal*, 62 Pa. St. 80; and *Brown's Appeal*, 89 Id. 144, both citing the principal case; *Beatty v. Wray*, 57 Am. Dec. 677, note 680.

SWIRES v. BROTHERLINE.

[41 PENNSYLVANIA STATE, 185.]

ASSISTANT OF OFFICER SELLING PROPERTY to satisfy a writ in his hands is entitled to the same protection as the officer is.

ONE WHO ACTS SIMPLY AS AUCTIONEER or crier for an officer, and in his presence, at a sale of property under a writ, has a right to bid at the sale, but if the crier was himself conducting the sale, then he would have no such right.

INADEQUACY OF PRICE IS NOT SUFFICIENT TO IMPEACH PUBLIC SALE which was fairly conducted in every respect.

WHERE OFFICER TAKES PROPERTY of one of three judgment debtors under a writ and sells it, if he makes a mistake as to the debtor who owns it, the sale will nevertheless be valid if the property is otherwise fully described.

OFFICER HOLDING WRIT CANNOT ADJUST EQUITIES existing between the parties in interest. If one of them violates his agreement with the other, the latter must take his legal remedy against the former. A writ issued contrary to such an agreement will protect the officer acting under it.

IN error. This is an action of trespass brought by Anthony Swires, the plaintiff in error, against John Brotherline, Edward Shoemaker, jun., and James S. Clark, for taking certain property of plaintiff. The court refused the first, second, and fourth instructions asked by plaintiff, the substance of which is stated by the court in the opinion. Shoemaker was agent of the judgment creditor, and was joined here as a defendant because it was claimed he violated a certain agreement between his principal and plaintiff here, but it was held here that the agreement could not affect the officer, and therefore it is omitted.

G. W. Reed, for the plaintiff in error.

R. L. Johnson, for the defendant in error.

By Court, **WOODWARD, J.** This was an action of trespass against the deputy marshal and his assistants for seizing and selling a portable steam saw-mill of the plaintiff. The defendants justified under a writ of *hab. fac. pos.* and *fi. fa.*, issued out of the circuit court of the United States for the western district of Pennsylvania, on a judgment in ejectment, obtained by Murray Hoffman, jun., a citizen of the state of New York, against a large number of defendants, of whom the plaintiff was one. The levy on the mill was for the purpose of satisfying the costs of the judgment and execution. The mill was advertised as the property of James Swires and John R. Smith, two of the defendants in the writ; was exposed to sale by Brotherline as crier, acting under the authority and in the presence of Clark, the deputy marshal, and after an adjournment of a week was struck down by Brotherline to himself as the only bidder. When the judgment in ejectment was obtained by Hoffman, his attorney in fact, Edward Shoemaker, another of the present defendants, agreed in writing that the verdict should inure to the benefit of Anthony Swires and Samuel Henchy, in proportion to their respective interests in one of the several tracts of land for which the ejectment was brought.

Upon this state of facts, the court held the general judgment in ejectment in favor of Hoffman, and the execution issued thereon for costs, a justification of the defendants, and directed a verdict for them accordingly. To this ruling several errors have been assigned, the first whereof is that the court ought to have submitted to the jury, in response to the plaintiff's fourth point, the facts therein recited, as strong evidence of fraud on the part of Brotherline, such as would avoid the sale and make him a trespasser.

The point was founded on the assumption that Brotherline acted at the sale as the assistant of deputy marshal Clark. The legal consequence of this fact is, that he is entitled to the same protection from the writ which it could afford to Clark. But it is argued that if he acted fraudulently, he forfeited the protection of the writ, and became a trespasser *ab initio*.

We see no evidence of fraud. The sale was duly advertised, and was made by open outcry in the presence of several bystanders, who were invited and urged to bid. The property

was twice offered, at an interval of a week, and every opportunity given to purchasers which the situation and circumstances would permit. There was nothing in Brotherline's relation to Clark as his assistant which made it unlawful, or indecent even, for him to cry the sale, for Clark might have cried it himself. Nor is there anything in the fact that he struck down the property at the first bid, for it was the only bid he was able to obtain, after a full, patient, and repeated trial. Some of our public works have been sold at a single bid. There is nothing in such a circumstance which necessarily discredits a sale. If a single bid be taken, and no opportunity given for a second one, that would be fraudulent; but where only one bid can be obtained, one is enough to make a valid action. But Brotherline himself was the bidder. That would be a discrediting circumstance if he had been intrusted with the conduct of the sale. Public officers and persons acting in fiduciary capacities have, in general, no right to become buyers at their own sales. But Brotherline was the mere crier of this sale. It was conducted under the direction and in the presence of Clark, as the deputy marshal. It was his sale, not Brotherline's. Auctioneers do sometimes bid at their own sales, and when it is fairly and openly done, it tends to enhance the price, and is no ground for treating the sale as fraudulent, especially if the auctioneer have no interest in the property, and no responsibility except as mere auctioneer.

Nor was the inadequacy of the price any impeachment of the sale. Property lawfully exposed to public sale must take its chances. Courts having control of writs of execution do sometimes treat gross inadequacy of price as a reason for setting aside sales of real estate, but personal property fairly advertised, fairly cried, and fairly knocked down must go for what it will fetch. Assuredly, the only bidder is not to be accounted guilty of a fraud, because others were not venturous enough to outbid him.

The court were quite right, therefore, in refusing the instructions demanded. There was no evidence of fraud to submit to the jury. It is unnecessary to consider whether a fraudulent sale, had it been proved, would have entitled the plaintiff to sue in trespass, for his complaint of error on this head is sufficiently answered by the want of evidence of a fraudulent sale.

As to the second error, we do not think it of much impor-

tance that the property was advertised as the property of James Swires and John R. Smith, instead of Anthony Swires. All three were named in the execution, or in the slip of paper which accompanied it, and which was made necessary by the insufficiency of the blank in the printed form to hold all the names. The marshal was commanded to make the costs out of the property of the defendants. The goods of any of them were seizable. He found the saw-mill in possession of Smith and of James Swires, the son of Anthony, and he naturally described it as their property. It was only a matter of description, and there was enough else to designate the article. None of the defendants were in doubt as to what was to be sold, and it was scarcely to be expected that the marshal should investigate the state of the title betwixt the father and son before proceeding with his writ.

The instructions of the court are the subject of the third error. We see no mistake in them. The court were clearly right in saying that the execution was a sufficient warrant for the conduct of the defendants, for such is the unquestioned law. And as to the agreement of Shoemaker with Swires and Henchy about part of the lands in suit, what was there in this to prevent the plaintiff from collecting the costs of his ejection? The observation of the learned judge was pertinent and conclusive—"that if the writ was issued by the plaintiff in violation of the agreement, Swires has his remedy upon it." He might have added that it was no part of the marshal's duty to adjust the equities of the plaintiff under that agreement.

The judgment is affirmed.

SHERIFF'S ASSISTANT CANNOT JUSTIFY TAKING OF PROPERTY of another, unless the property is in fact taken by the officer under his process. A supposition by the assistant that the sheriff had taken it is no justification: *Johnson v. Stone*, 77 Am. Dec. 707.

SHERIFF'S SALE WILL NOT BE SET ASIDE for mere inadequacy of price: *Cooper v. Wilson*, 96 Pa. St. 414, citing the principal case.

YAPLE v. TITUS.

[41 PENNSYLVANIA STATE, 195.]

AFTER COURT OF COMPETENT JURISDICTION HAS ACQUIRED JURISDICTION over the estate and person of a lunatic, its judgment or order directing a sale of his real estate cannot be inquired into in a collateral proceeding. If the lunatic dies prior to the entry of such order, it might be reversed in error if the record had been made to show that fact, but it is not *per se* void.

IN error. Ejectment for certain real estate. The facts are fully stated in the opinion.

J. H. Walker, for the plaintiffs in error.

J. C. Marshall, for the defendants in error.

By Court, STRONG, J. This was an action of ejectment. The plaintiffs claimed as heirs of Timothy Fuller, of whose person and estate a committee was appointed on the eighteenth day of June, 1841, under a commission of lunacy. In his life-time he had been seised of the property in dispute, and he had died intestate. The defendants claimed under a sale, made by order of the court of common pleas, for the payment of the debts of the lunatic, including also the expenses of his support and maintenance, and that of his family. The petition for the sale was presented by the committee, and an order to sell was granted on the twelfth of November, 1842. The first sale made was set aside by the court, but the land was again sold to one under whom the defendants claimed, on the fourth of March, 1844, and the sale was confirmed on the eleventh of May next following. These proceedings of the common pleas on their face appear to have divested the title of Timothy Fuller. But to avoid their apparent effect, the plaintiffs offered to show at the trial that Fuller, the lunatic, died on the sixth day of April, 1842, before the order of sale was granted. Whether it was competent for them to show that fact, is the sole question before us.

It is a familiar principle that the judgment or decree of a court of competent jurisdiction cannot be reversed or inquired into in a collateral proceeding except for fraud. Nor, standing on the public records, shall it be deemed a nullity, provided the magistrate had jurisdiction of the matter adjudicated. This principle is said to have no exception: *Hazelett v. Ford*, 10 Watts, 101. No fraud is alleged in this case. But it is said that the court of common pleas had no jurisdiction over the estate of Timothy Fuller after his death, and that consequently the order to sell and the sale made under it were void. It is not enough for the plaintiffs to show that they were erroneous, for errors of law, or even of fact, can be corrected only by writ of error or by appeal. It may be that the order of sale must have been set aside, had an appeal been taken from the court which made it. But the question now is, in this collateral action, whether the order was wholly void for defect of jurisdiction to make it.

The fifth article of the constitution of the state declares that the several courts of common pleas shall have the power of a court of chancery, so far as relates to the care of the persons and estates of those who are *non compos mentis*, and authorizes the legislature to vest in the said courts such other powers to grant relief in equity as shall be found necessary. The power of a chancellor over the estate of a lunatic is that of custody, of management, and of application to the lunatic's support and that of his family, to the education of his minor children, and to the payment of his debts. Under our act of assembly, this power is exercised through a committee, appointed by the court, and the committee may be ordered to sell the real estate belonging to the lunatic, if the personal property is not sufficient for the purposes already mentioned. Yet the charge of the property is in the court, though administered by a committee. After the return of an inquisition finding lunacy, the jurisdiction of the court over the property of the lunatic is complete, either for custody, for management, or for sale. And though his death necessarily terminates all jurisdiction over his person, there are not wanting cases which assert that jurisdiction over the property continues, for some purposes, even after death: *Ex parte McDougal*, 12 Ves. 384; see also Shelford on Lunacy, 22-24. To what extent this may be, the case now in hand does not demand that we should inquire. It is enough for our present duty that the court of common pleas had complete jurisdiction over the property of Timothy Fuller, and might, without even any irregularity, have ordered a sale up to April 6, 1842. Did, then, his death on that day so completely oust the jurisdiction of the court over the property as to make a subsequent order of sale not merely erroneous, but an absolute nullity? An order of sale was a proceeding *in rem*, and not a decree against the lunatic himself. Notice of it to him would have been unnecessary had he been living. To justify it, the court needed no jurisdiction of his person. The act of assembly, under which the sale was ordered, contemplated no notice to the lunatic. Now, it would seem to be well established, that in civil proceedings against a person, his death does not so completely take away the jurisdiction of a court which has once attached as to render void a judgment subsequently given against him. The judgment is reversible in error, if the fact and time of death appear on the record, or in error *coram nobis*, if the fact must be shown *aliunde*. But it is not void. Thus in 1 Rolle's Abr. 742, 6,

12, it is said: "If in a *cui in vita* the tenant dies, and afterwards judgment is against him, which is erroneous, and execution is sued against the heir, he shall not avoid the judgment in assize without error." "So in a *scire facias* by an executor, upon a judgment in ejectment by his testator against B, execution shall not be avoided nor judgment stayed by saying that the tenant died *pendente lite*, for he ought to avoid it by error:" 1 Rolle's Abr. 742, 1, 18; 3 Com. Dig., tit. Error, D. Without, however, citing the authorities at length, we refer to the opinion of Judge Kennedy, in *Warder v. Tainter*, 4 Watts, 279 et seq., where a large number are collected. Other American cases, not collected by him, might be added. Thus in *Coleman v. McAnulty*, 16 Mo. 177 [57 Am. Dec. 229], it was ruled that a judgment rendered in favor of a plaintiff, who had died before its rendition, was not void. So in *Collins v. Mitchell*, 5 Fla. 364, it was held that the death of the party defendant before judgment does not render the judgment void, but only voidable upon a writ of error *coram nobis*. From the report of the case, it would appear that the defendant died before the institution of the suit, which was commenced by attachment. See also *Day v. Hamburg*, 1 Browne, 75. These authorities show unmistakably that even a judgment *in personam* is not void merely because the defendant died before it was rendered. At most, it is only voidable, reversible in error, but not impeachable collaterally. And some of the cases deny that it can be reversed in error, when the averment of the error involves a contradiction of the record.

There is even less reason for holding a decree *in rem*, such as was this order of sale, to be void, if made after the death of the owner of the property. The reason why even a judgment *in personam* is voidable in error is, because the party against whom it was rendered has been deprived of an opportunity of showing cause against the plaintiffs' claim. But in a proceeding *in rem* he may or may not intervene. As already said, in an application for an order to sell the real estate of a lunatic, the law does not contemplate his being heard. He has lost nothing, therefore, by death. His property has been intrusted to the court, which is to exercise its discretion over both its custody and its sale. If, then, a personal judgment obtained against him after his death, jurisdiction of the person, having once been acquired, would be only voidable, a decree for the sale of his property, the court having had jurisdiction over it, can be no more than voidable, though made when he had ceased to be in life.

The cases relied upon by the plaintiff are not in conflict with these views. Letters of administration on the estate of a living person, and the probate of the will of such a person, are of course void, for there never was any jurisdiction of the person or property. The bond and warrant of a married woman to confess judgment are void, and of course can authorize no judgment at all. The observation of Chief Justice Gibson, in his dissenting opinion in *Campbell v. Kent*, 3 Penn. & W. 79, when remarking upon *Randal's Case*, 2 Mod. 308, and *Warter v. Perry & Spring*, Cro. Eliz. 199, was but a suggestion not called for by the case. He said that "perhaps the true ground of both these cases was that the judgment was not only injurious, but void, as having been rendered against a party not in existence, and therefore requiring no reversal to render it a nullity." That was, however, not the ground on which the cases were rested. *Warter v. Perry & Spring*, *supra*, was a *scire facias* against bail of Brooke, who pleaded that Brooke was dead the day of the judgment given. "The court," says the reporter, "first held it no plea, for it goeth in avoiding the judgment, and proveth it to be erroneous, which cannot be avoided but by error. But they might plead the death of Brooke before *scire facias* and after judgment, for then they could not bring in the body. But afterwards the plea was received because they cannot have a writ of error to reverse the judgment." If this be a correct report of the case, it shows that the plea was received for an entirely different reason from that suggested by Judge Gibson, *scil.*, that the judgment was void. The reason given was, that the pleaders were not in privity with the defendant, and could not sue out a writ of error. And it seems that the plea was receivable at all events, not necessarily impeaching the judgment; for whether the defendant died before or after judgment, the bail could not bring in his body.

The same case is reported in Leonard, part 2, case 125, and there it appears that the defendants were only permitted to plead that Brooke was dead after judgment, that not amounting to a surmise against the judgment. This report makes the case accord with other rulings that a judgment may not be attacked by showing collaterally that the defendant was dead before it was rendered. In *Randal's Case*, 2 Mod. 308, which was debt upon a bond against one as administrator, he pleaded a judgment recovered against his intestate, and that he had not assets *ultra*. The plaintiff replied that

the intestate died before judgment, and that after his death judgment was obtained and kept alive *per fraudem*. The defendant rejoined, traversing the fraud, but did not answer the death of his intestate; and upon a demurrer it was argued for the plaintiff that the judgment was ill, and that he, being a stranger to it, could neither bring a writ of error or deceit, and had no other way to avoid it but by a plea; and that it is put as a rule that when judgment may be reversed by writ of error, the party shall not be permitted to do it by plea, but a stranger to it must avoid it by plea, because he is no party to the judgment; as if a *scire facias* be brought against the bail, it is a good plea for them to say that the principal was dead before judgment given, by way of excusing themselves to bring in the body; but it is not good to avoid the judgment, because it is against the record, which must be avoided by writ of error. The reporter, in *Randal's Case*, *supra*, adds: "The court were of opinion that the plaintiff might avoid the judgment without a writ of error, especially in this case, where it is not only erroneous, but void." It is not easy to understand for what reason the court were of opinion that the judgment was void, whether for fraud or for the death of the defendant's intestate. The principal thing argued and decided was, that a stranger might attack a judgment by plea, when one in privity would be put to a writ of error. And the case is cited by Baron Comyn, as deciding only that if a party cannot have error, he may avoid a judgment by plea: 3 Com. Dig., tit. Error, D, 569. As a general proposition, even this may be doubted. But if it be taken as good law, it does not help the plaintiffs in the present case, for they claim as heirs of Timothy Fuller, and in privity with him. They might, therefore, have assailed the decree of the court of common pleas directly by appeal. The language of the court in *Caldwell v. Walters*, 18 Pa. St. 79, also cited by the plaintiffs, is no more than a quotation from the dissenting opinion of Judge Gibson, already noticed. The industry of the counsel has not found any case which rules that a judgment against a defendant, who died before it was given, is, on that account, *ipso facto* void, much less any that treats as a nullity a judgment *in rem*, because of the previous death of the owner. As we have seen, there are numerous decisions to the contrary.

Had, therefore, the plaintiffs been permitted to prove that Timothy Fuller died before the order of sale, it would have availed them nothing. It would not have annulled the order,

though it might have shown it to have been erroneous. The evidence offered was therefore properly excluded.

We feel the more satisfaction in coming to such a conclusion in this case, for it results in obvious justice. The property was sold eighteen years ago. It was sold for the payment of the debts of the lunatic, a part of which were debts due these very plaintiffs. The heirs of the lunatic knew of the order to sell, and of the sale, for some of them moved the court to set aside the first sale made under the order, not on account of his prior death, but because it was believed the property would bring more if offered for sale again. It would be a great hardship if, after all this, and after the lapse of eighteen years, the heirs could now recover the land from purchasers who bought on the faith of a judicial decree, and who may have greatly improved the land and enhanced its value.

The judgment is affirmed.

AFTER RETURN OF INQUISITION finding lunacy, the jurisdiction of the court over the property of the lunatic is complete either for management, custody, or sale: *Holderman's Appeal*, 104 Pa. St. 260, citing the principal case. The inquisition must be made under the provisions of the statute regulating the proceedings of the court in the exercise of its chancery powers for the care of lunatics and their estates: *Id.*

JUDGMENT IN REM CANNOT BE ATTACKED in a collateral proceeding except for fraud, although it may have been voidable if the proper proceeding had been taken against it: *Butterfield's Appeal*, 77 Pa. St. 200, citing the principal case.

STRUTHERS v. KENDALL AND SON.

[41 PENNSYLVANIA STATE, 214.]

ACCOMMODATION INDORSER OF NOTE OR BILL IS LIABLE THEREON to subsequent indorsee who receives it for value and in the ordinary course of business.

INDORSEE OF BILL WHO RECEIVES IT BEFORE MATURITY IN CONSIDERATION OF ANTECEDENT INDEBTEDNESS of his indorser, and gives him credit on his books for the amount of the note, is entitled to recover in an action against a prior indorser, notwithstanding the equities which might have existed between the original parties, such credit being a sufficient consideration in law to constitute him an indorsee for value.

ALTERATION OF BILL OF EXCHANGE BY NOTING RESIDENCES OF INDORSERS thereon, after their names, is not material so as to affect in any way either its identity or validity.

AGENT IS COMPETENT WITNESS FOR PRINCIPAL, except where the latter is sued on account of the agent's negligence.

TESTIMONY OF NOTARY IS ADMISSIBLE TO PROVE DEMAND OF PAYMENT, protest, and notice thereof to defendant.

WHERE BILL IS ADDRESSED TO DRAWEE AT PARTICULAR HOUSE, and is accepted generally by him, the address indicates the place where it is to be presented for payment, and a presentment at such place will be sufficient as against the drawee and indorsers.

ASSUMPSIT against Thomas Struthers on his indorsement of a bill of exchange drawn by Edwin Hazen on James T. Foster, in favor of Tilden & Co., or order, accepted by Foster, and indorsed by said Tilden & Co. and Thomas Struthers, and also, subsequently in order, by W. A. Irvine and William Whitney & Co. Plaintiffs are the holders of the bill by indorsement and delivery thereof to them in consideration of a pre-existing indebtedness of their indorsers, Whitney & Co., on which indebtedness plaintiffs credited them with the amount of the bill on receipt thereof. The defense set up is that the bill was invalid, having been given without consideration to Tilden & Co., to enable them to negotiate it to meet an existing indebtedness on their part, and that they disposed of it to William Whitney & Co. for a pre-existing indebtedness, the latter firm transferring it to the plaintiffs as above, without knowledge of the defendant or Irvine, who were accommodation indorsers only. Defendant also sets up that the bill is invalid by reason of an alteration therein without defendant's knowledge or consent, in adding to the names of the indorsers upon the bill the places of their residences. Judgment went for plaintiffs, whereupon defendant sued out a writ of error, assigning the matters stated in the opinion, and also that the court erred in admitting in evidence the deposition of one Foster, a notary, to prove his alleged demand of payment, protest, and notice thereof to defendant, because, as agent for plaintiffs to do this, he would be liable to them for not doing so, and hence is incompetent without a release. The remaining facts appear in the opinion.

G. Church and James Sill, for the plaintiff in error.

John H. Walker, for the defendants in error.

By Court, **WOODWARD, J.** The most important question on this record, though not the first in order, is, whether the plaintiff in error, defendant below, was entitled to show that he was merely an accommodation indorser, and that the bill was passed to Whitney & Co., and by them to the present holders, defendants in error and plaintiffs below, without any present consideration being paid for it, and in fraud of the defendant. The court rejected the evidence, on the ground that it was

already in proof that Kendall & Son were *bona fide* purchasers of the bill, and as such were entitled to enforce it against the indorser, without regarding the equities between him and the payee. If the fact was as assumed by the court, there can be no doubt of the correctness of the legal inference. The bill was made and indorsed in New York, and is to be governed by the law of that state; but in that state, as well as in Pennsylvania and all other commercial countries, an indorser who gives credit to a note or bill by his indorsement, whether with or without consideration, is bound to make the paper good in the hands of any subsequent indorsee who receives it for value, and in the ordinary course of business.

But a series of cases in the New York courts, beginning with *Coddington v. Bay*, 20 Johns. 637 [11 Am. Dec. 342], S. C., *sub nom. Bay v. Coddington*, 5 Johns. Ch. 54 [9 Am. Dec. 268], and followed by *Rosa v. Brotherson*, 10 Wend. 85, *Ontario Bank v. Worthington*, 12 Id. 593, *Payne v. Cutler*, 13 Id. 605, and *Stralker v. McDonald*, 6 Hill, 93, while recognizing the general doctrine as above stated, has modified it with the qualification that where the holder has received the bill for an antecedent debt, either as nominal payment or as security for payment, without giving up any security for such debt, which he previously had, and without paying any money, or giving any new consideration at the time, he is not a holder of the note for a valuable consideration. In the last of the above-cited cases, which was nothing more than a fraudulent pledge of two notes as security for an antecedent debt, the payee was permitted to recover them from the holder in an action of trover, Chancellor Walworth reviewing all the authorities bearing on the main question, and strongly questioning the doctrine of the United States supreme court, as announced in *Swift v. Tyson*, 16 Pet. 1. In the case of *Dezeng v. Fyfe*, 1 Bosw. 335, it was declared by the superior court of the city of New York that all the above cases were instances of the fraudulent misappropriation of a note, or where there was some fraud in procuring it, or where there existed some circumstances in the relation of the parties which would make its collection operate as a fraud on the maker; and it was accordingly held by that court, there being no taint of fraud in their case, that the maker of a promissory note for the accommodation of the payee cannot set up a defense that the note was transferred to the plaintiff in satisfaction of or as collateral security for a pre-existing debt. The circumstances

of the case showed that nothing was given up in consideration of the note when it came to the indorsees' hands. This case is not authority as against those first cited, but yet it seems to suggest the distinction on which these cases are reconcilable with such cases as *Seneca County Bank v. Nears*, 3 N. Y. 444; *Grandin v. Le Roy*, 2 Paige, 509; *Lathrop v. Morris*, 5 Sandf. 7; *Clark v. Merchants' Bank*, 2 N. Y. 880; and *Goodman v. Simonds*, 20 How. 343.

I have not thought it worth while to go into a minute analysis of the New York cases, to see how sound the distinction is which was suggested by the superior court, because in our case the evidence on the part of the plaintiff fully justified the court in assuming that the plaintiffs were *bona fide* holders in usual course, and for a valuable consideration. Darius Young swore that Tilden & Co., of which firm he was a member, "took the draft after the indorsement by Struthers and Irvine, and passed it to William Whitney & Co., of Boston, within a few days after it was made, on account as business paper, we being indebted to them, having a running account with them."

Again this witness says: "The firm of Tilden & Co. was indebted to the firm of William Whitney & Co., in account for money and goods, and I passed said draft to William Whitney & Co., in account as part payment of said indebtedness, and in the usual and regular course of business as business paper. They had no knowledge of its being accommodation paper."

To the same effect is the testimony of David H. Sparhawk, a member of the firm of Whitney & Co. This witness also described the transfer of the draft from Whitney & Co. to Kendall & Son, the plaintiffs below. His language was: "The draft came into the hands of plaintiffs, as I have already stated, on the first of March, 1854, in part payment of the debt of my firm to theirs." And Barnes says: "It was passed to plaintiffs in the due and usual course of business. The firm of William Whitney & Co. was indebted to them for money received by them from purchases of wool belonging to plaintiffs, and said draft was entered on plaintiffs' books to the credit of said William Whitney & Co. at par, as was usual and customary in the course of business.

Now, can it be doubted, in view of such proofs, which were wholly uncontradicted, that both Whitney & Co. and Kendall & Son were *bona fide* purchasers of the bill in due course, and for a valuable consideration? They both received it, to be sure, on account of antecedent indebtedness, but in part pay-

ment of that indebtedness. When they entered it as a credit on their books, they gave up so much of their debt. What more could they have done, if the payment had been in cash? What better title to the paper could a cash purchase have given the plaintiffs?

According to none of the New York authorities, and certainly according to none of ours, could such a purchase of a bill be impeached. It had all the requisites of an ordinary mercantile transaction. Then the holders are not subject to any equities which might arise between the original parties.

The second and seventh errors have reference to the addition that was made of the residences of the drawer and indorsers. Sparhawk says he added the words "Warren, Warren Co., Pa.," after the name of Struthers. They were not on the bill when it came into the hands of Whitney & Co.

Was it a material alteration of the instrument? Was it an alteration of the instrument at all? Unquestionably, every alteration in a negotiable instrument, whereby the identity of the paper is in any way affected, is material, and avoids it, even in the hands of a subsequent indorsee for value, except as to him who made the alteration: *Stephens v. Graham*, 7 Serg. & R. 505 [10 Am. Dec. 485]. But we hold that the noting of the residence of drawers and indorsers after their names does not affect the identity of a bill of exchange, nor avoid it as to any of the parties to it. It is in the nature of a memorandum for the notary, that he may know how to address notices of protest. It does not vary the tenor of the bill, nor add to the responsibility of indorsers. As well might the customary file-mark, indicating when the paper falls due, be called a material alteration. When Struthers put his name on the back of this paper, he authorized notice of non-payment to be sent to him at Warren, Pennsylvania, for that was his proper residence. Whether his admitted residence was conveyed to the notary by word of mouth, by a separate memorandum, or by the mark subjoined to his name, the bill remained the same as it was at first made by his indorsement.

In respect to the first error assigned, it is sufficient to say that if Foster, the notary, be regarded as the agent of the plaintiffs, the general rule is, that an agent is competent as a witness for his principal, except in cases where the principal is sued on account of the negligence of the agent: *McDowell v. Simpson*, 3 Watts, 135 [27 Am. Dec. 338]; *Murphy's Appeal*, 7 Watts & S. 166; *Gilpin v. Howell*, 5 Pa. St. 51 [45 Am. Dec.

720]. Here no negligence of the notary is alleged, nor could it be, for it was decided in *Pierce v. Struthers*, 27 Id. 249, and *Struthers v. Blake*, 30 Id. 142, that his duties were well performed. The point involved in this exception was substantially ruled in *McGarr v. Lloyd*, 3 Id. 474.

The other assignments of error are sufficiently answered by the rulings in the two cases above named: *Pierce v. Struthers*, *supra*, and *Struthers v. Blake*, *supra*.

The judgment is affirmed.

LIABILITY OF ACCOMMODATION INDORSER OF NEGOTIABLE INSTRUMENT: See note to *Fitzhugh v. Love*, 3 Am. Dec. 571 et seq.; *Bigelow v. Colton*, 74 Id. 633, and note.

PRE-EXISTING DEBT AS CONSIDERATION FOR NOTE OR FOR TRANSFER THEREOF: See *Emanuel v. White*, 69 Am. Dec. 385, and note; *Dixon v. Dixon*, 76 Id. 128, and note.

ONE TO BE HOLDER FOR VALUE, OF NEGOTIABLE INSTRUMENT, must give some new credit on the faith thereof: *Lenheim v. Wilmarding*, 55 Pa. St. 73, citing the principal case.

WHAT ALTERATION OF NEGOTIABLE INSTRUMENT WILL AFFECT ITS VALIDITY: See *Miller v. Reed*, 67 Am. Dec. 459, and note; *Trigg v. Taylor*, 72 Id. 263; *Starges v. Williams*, 75 Id. 473. In *Kountz v. Kennedy*, 63 Pa. St. 187, the court, citing the principal case, hold that the test as to the materiality of an alteration in a negotiable instrument is whether the identity of the note is affected thereby, or not.

PARYS & Co.'s APPEAL.

[41 PENNSYLVANIA STATE, 273.]

SHERIFF LEVYING UPON PERSONAL PROPERTY of a judgment debtor must, within a reasonable time, take such possession thereof as will apprise every one that it has been taken in execution. Such property so taken must be sold publicly after public notice given.

IF JUDGMENT CREDITOR ENTERS INTO ARRANGEMENT WITH HIS DEBTOR to permit the latter and a sheriff's keeper to remain in possession and sell the goods at private sale during the time the property is being advertised for sale by the officer, his execution will be postponed and a junior writ will be first satisfied out of the goods.

THE facts are stated sufficiently in the opinion.

Taylor and Morris, for the appellants.

L. L. McGuffin, for the appellees.

By Court, THOMPSON, J. This is an appeal from a decree distributing the proceeds of a sheriff's sale of personal property. The appellants' execution was first issued; but it was claimed that it was postponed to a subsequent execution, be-

cause, as the auditor found, the goods were never removed or the store closed; but at the instance of the plaintiff's attorney, the store was put in charge of one Bostwick, who had been there, as the auditor says, "as a loafer and clerk" for the past two years, with a privilege to sell as usual and account to the sheriff for the money received. It appears, also, by the auditor's report, that he accordingly took possession, and that he and the defendants in the execution sold goods up to and on the day of the sheriff's sale, that there was no perceptible difference in the manner of conducting the business of the store before and after the levy, and that no account of the goods sold was kept, but only the amount of money alleged to have been taken on sales, reported to the sheriff.

The question of postponement arises out of these facts alone, for there was no proof or allegation that the levy was merely for security, nor was there any unnecessary delay in executing the writ, as the facts show, and no order to delay it. The sale took place in eight days after the levy.

The court below held the appellants' execution postponed in favor of the appellees, which came to the sheriff's hands the day before the sale. I was inclined to doubt the propriety of this on the argument, but an examination of recent authorities has dispelled these doubts. *Bingham v. Young*, 10 Pa. St. 395, was ruled mainly on facts like those found in this case, and there the execution of the party permitting such an arrangement was postponed. So in *Keyser's Appeal*, 13 Id. 409 [53 Am. Dec. 487], the same doctrine was held; and again in *Truitt v. Ludwig*, 25 Id. 145. There were other elements sufficient in the last-named case, in my opinion, to have worked a postponement of the execution, but leaving the goods with the defendant in the execution, and allowing him to sell as before the levy, was regarded as material. Goods levied on should, in a reasonable time thereafter, be taken possession of by the officer of the law, in such a manner as to apprise everybody that they have been taken in execution: *Wood v. Vanarsdale*, 3 Rawle, 401. So also does the law require the sale of property so taken to be made publicly after public notice given: Act of sixteenth of June, 1836, sec. 42. Possession and control remaining after levy as before, and private sales, are both in contravention of the law, and when they result from arrangements made by the execution creditor, he will be postponed to a junior execution. Such arrangements are so evidently for the benefit of the debtor, rather than a means of

collecting the debt according to law and the exigence of the writ, and they present such strong temptation to do wrong, not only in making sales, but to carry off and conceal the property, that the law forbids them altogether, not alone for fraud, in fact, but as being a fraud in law. We think the facts found by the auditor bring this case within the rule, and that the decree of the court below must be affirmed.

Decree affirmed, at the costs of the appellants.

DIRECTION BY EXECUTION CREDITOR to the sheriff holding the execution not to sell the property is a stay of the writ as to other like creditors, and if they take the proper proceedings in time they will be preferred to such execution creditor; but it is too late to move after the officer has lost control of the property: *Work's Appeal*, 92 Pa. St. 261, citing the principal case.

LAW DOES NOT FAVOR LEVYING EXECUTION merely to secure a lien, and will postpone the payment of such an execution in favor of junior executions: *Kent, Sante, & Co.'s Appeal*, 87 Pa. St. 167; *Stern's Appeal*, 64 Id. 449, both citing the principal case.

FORSYTH v. WELLS.

[41 PENNSYLVANIA STATE, 291.]

TROVER IS PROPER REMEDY FOR TRESPASS committed by mining coal and carrying it away from another's land by mistake.

MEASURE OF DAMAGES FOR MINING COAL ON ANOTHER'S LAND by mistake, and carrying it away, is the fair value of the coal in its place before being mined, and such injury to the land as the mining may have caused.

IN error. Action of trover for coal mined and carried away from the land of defendant in error by mistake by the plaintiff in error. The other facts are sufficiently stated in the opinion.

D. Kaine, for the plaintiff in error.

By Court, **LOWRIE, C. J.** We are to assume that it was by mistake that the defendant below went beyond his line in mining his coal, and mined and carried away some of the plaintiff's coal, and it is fully settled that for this trover lies: *Mather v. Trinity Church*, 3 Serg. & R. 515 [8 Am. Dec. 663]; *Wright v. Guier*, 9 Watts, 172 [36 Am. Dec. 108]; *Sanderson v. Haverstick*, 8 Pa. St. 294; *Vastbinder v. Wager*, 6 Id. 348; *Backenstoss v. Stahler*, 33 Id. 251 [75 Am. Dec. 592].

What, then, is the measure of damages? The plaintiff insists that because the action is allowed for the coal as personal property, that is, after it had been mined or severed from the realty, therefore, by necessary logical sequence, she is entitled

to the value of the coal as it lay in the pit after it had been mined; and so it was decided below. It is apparent that this view would transfer to the plaintiff all the defendant's labor in mining the coal, and thus give her more than compensation for the injury done.

Yet we admit the accuracy of this conclusion, if we may properly base our reasoning on the form rather than on the principle or purpose of the remedy. But this we may not do; and especially we may not sacrifice the principle to the very form by which we are endeavoring to enforce it. Principles can never be realized without forms, and they are often inevitably embarrassed by unfitting ones; but still the fact that the form is for the sake of the principle, and not the principle for the form, requires that the form shall serve, not rule, the principle, and must be adapted to its office.

Just compensation in a special class of cases is the principle of the action of trover, and a little study will show us that it is no unyielding form, but adapts itself to a great variety of circumstances. In its original purpose, and in strict form, it is an action for the value of personal property lost by one and found by another and converted to his own use. But it is not thus restricted in practice; for it is continually applied to every form of wrongful conversion, and of wrongful taking and conversion, and it affords compensation, not only for the value of the goods, but also for outrage and malice in the taking and detention of them: *Dennis v. Barber*, 6 Serg. & R. 426; *Berry v. Vautries*, 12 Id. 93; *Taylor v. Morgan*, 3 Watts, 333. Thus, form yields to purpose for the sake of completeness of remedy. Even the action of replevin adapts itself thus: *McDonald v. Scaife*, 18 Pa. St. 381 [51 Am. Dec. 556]. And so does trespass: *Morrison v. Robinson*, 31 Id. 456.

In very strict form, trespass is the proper remedy for a wrongful taking of personal property, and for cutting timber, or quarrying stone, or digging coal on another man's land and carrying it away; and yet the trespass may be waived and trover maintained, without giving up any claim for any outrage or violence in the act of taking: *Moore v. Shenk*, 3 Pa. St. 13 [45 Am. Dec. 618]. It is quite apparent, therefore, that this form of action is not so uniform and rigid in its administration as to force upon us any given or arbitrary measure of compensation. It is simply a form of reaching a just compensation, according to circumstances, for goods wrongfully appropriated. When there is no fraud, or violence, or malice,

the just value of the property is enough: *McNair v. Compton*, 35 Id. 28.

When the taking and conversion are one act, or one continued series of acts, trespass is the more obvious and proper remedy; but the law allows the waiver of the taking, so that the party may sue in trover; and this is often convenient. Sometimes it is even necessary, because the plaintiff, with full proof of the conversion, may fail to prove the taking by the defendant. But when the law does allow this departure from the strict form, it is not in order to enable the plaintiff, by his own choice of actions, to increase his recovery beyond just compensation; but only to give him a more convenient form for recovering that much.

Our case raises a question of taking by mere mistake, because of the uncertainty of boundaries; and we must confine ourselves to this. The many conflicting opinions on the measure of damages in cases of willful wrong, and especially the very learned and thoughtful opinions in the case of *Silbury v. McCoon*, 4 Denio, 332, S. C., 3 N. Y. 379 [53 Am. Dec. 307], warn us to be careful how we express ourselves on that subject.

We do find cases of trespass where judges have adopted a mode of calculating damages for taking coal that is substantially equivalent to the rule laid down by the common pleas in this case, even where no willful wrong was done, unless the taking of the coal out by the plaintiff's entry was regarded as such. But even then we cannot avoid feeling that there is a taint of arbitrariness in such a mode of calculation, because it does not truly mete out just compensation: *Martin v. Porter*, 5 Mee. & W. 351; *Raleigh v. Atkinson*, 9 Id. 672; *Queen v. Norwich*, 3 Q. B. 283; and see 28 Eng. L. & Eq. 175. We prefer the rule in *Wood v. Morewood*, 3 Q. B. 440, note, where Parke, B., decided, in a case of trover for taking coals, that if the defendant acted fairly and honestly, in the full belief of his right, then the measure of damages is the fair value of the coals, as if the coal-field had been purchased from the plaintiffs. See also Bainbridge on Mines and Minerals, 510; *Greenfield B'k v. Leavitt*, 17 Pick. 1 [28 Am. Dec. 268].

Where the defendant's conduct, measured by the standard of ordinary morality and care, which is the standard of the law, is not chargeable with fraud, violence, or willful negligence or wrong, the value of the property taken and converted is the measure of just compensation. If raw material has, after ap-

propriation, and without such wrong, been changed by manufacture into a new species of property, as grain into whisky, grapes into wine, furs into hats, hides into leather, or trees into lumber, the law either refuses the action of trover for the new article, or limits the recovery to the value of the original article: *Silsbury v. McCoon*, 6 Hill, 425, and note; *Hyde v. Cookson*, 21 Barb. 92; *Swift v. Barnum*, 23 Conn. 523; *Moody v. Whitney*, 88 Me. 174 [61 Am. Dec. 239].

Where there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury done is the purpose of all remedies; and so long as we bear this in mind, we shall have but little difficulty in managing the forms of actions so as to secure a fair result. If the defendant, in this case, was guilty of no intentional wrong, he ought not to have been charged with the value of the coal after he had been at the expense of mining it; but only with its value in place, and with such other damage to the land as his mining may have caused. Such would manifestly be the measure in trespass for mesne profits: *Morrison v. Robinson*, 31 Pa. St. 456.

Judgment reversed, and a new trial awarded.

READ, J., dissented.

THE PRINCIPAL CASE IS CITED, APPROVED, AND DISTINGUISHED in *Lyon v. Gormley*, 53 Pa. St. 265, to the points that trover will lie, and the measure of damages.

IN CASE OF FRAUD, VIOLENCE, OR OUTRAGE, damages in trover will be allowed in excess of the value of the property taken, and interest: *Hill v. Canfield*, 56 Pa. St. 459, citing the principal case.

MEASURE OF DAMAGES, where a person innocently and unintentionally commits a trespass in digging past the line of his own land, is the damage to the land, and the value of the property taken as it stood in place: *Coleman's Appeal*, 62 Pa. St. 278, citing the principal case. The same principle is decided in *Hardie v. Young*, 55 Id. 176; *Elge v. Kille*, 84 Id. 339, 340; *Curtis v. Waring*, 92 Id. 109, citing the principal case. Note to *Backenstoss v. Stahler's Adm'rs*, 75 Am. Dec. 598, where the principal case is cited. See also *Hutchinson v. M. & M. Bank*, ante, p. 596, and note.

DEAN v. NEGLEY.

[41 PENNSYLVANIA STATE, 312.]

INFLUENCE GENERATED BY LAWFUL RELATIONS, such as legitimate family and social relations, is not such an influence upon a testator as will invalidate his testamentary disposition of his property, unless it is exerted over the very act of devising so as to prevent the will from being truly the act of the testator. If this influence arises from unlawful relations,

and should be exercised, it would be an unlawful influence; if a will is made under such influence, it is proper to submit the question to the jury to determine whether or not it had unduly affected the mind of the testator while making his will.

IN error. This is an issue *devisavit vel non*, directed in the matter of the testamentary writing of William Johnson, deceased. Daniel Negley and S. Cuthbert were plaintiffs, and Alexander Dean and Elizabeth E. Dean, his wife, were defendants. Thomas M. Marshall was appointed guardian *ad litem* for the minor daughters of John and Joanna Bolton, and defendants were directed to notify him to defend. The objections to the probate of the will were that at the time of the alleged execution thereof, the testator, William Johnson, was of non-sane mind and memory, and incapable of executing a valid will; that the will was procured by fraud, coercion, and undue influence exercised by Mrs. Bolton over testator's mind; that he labored under monomania, weakness, and delusion in regard to his heir at law. On the trial, plaintiffs proved the execution of the will and the sanity of the testator at the time of its execution. Defendants proved that the testator had suffered for ten years with cancer of the eye and nose, and that it had affected his mind; that in 1830 he intermarried with Jerusha Butler, and that they had one daughter, now Mrs. Elizabeth E. Dean, the defendant; that at the time of his marriage he was worthless in property, and what property he afterwards owned he acquired as heir at law of his wife; that in 1848 his relations with Mrs. Bolton were such and became so notorious that his wife and daughter left their home and never afterwards returned; that the daughter afterwards intermarried with her co-defendant; that improper and illicit relations continued to exist between testator and Mrs. Bolton from 1838 until the death of Mrs. Johnson, and afterwards; and that up to the time of his death she exercised a controlling and despotic influence over him; that his mind had become impaired by the use of opiates and narcotics. This offer was refused by the court. Judgment was for plaintiffs. Defendants sued out this writ, and assigned as error the ruling out of the above-offered testimony.

C. Shaler, and Bruce and Negly, for the plaintiffs in error.

Marshall and Brown, for the defendants in error.

BY COURT, LOWRIE, C. J. The will of a man who has testamentary capacity cannot be avoided merely because it is un-

accountably contrary to the common sense of the country. His will, if not contrary to law, stands for the law of descent of his property, whether his reasons for it be good or bad, if indeed they be his own, uninduced by unlawful influence from others. Lawful influence, such as that arising from legitimate family and social relations, must be allowed to produce its natural results, even in influencing last wills. However great the influence thus generated may be, it has no taint of unlawfulness in it; and there can be no presumption of its actual unlawful exercise merely from the facts that it is known to have existed, and that it has manifestly operated on the testator's mind as a reason for his testamentary dispositions. Such influences are naturally very unequal, and naturally productive of inequalities in testamentary dispositions; and as they are also lawful in general, and the law cannot criticise and measure them so as to attribute to them their proper effect, no will can be condemned because the existence of such an influence is proved, and because the will contains in itself proof of its effect. It is only when such influence is unduly exerted over the very act of devising, so as to prevent the will from being truly the act of the testator, that the law condemns it as a vicious element of the testamentary act; so the law always speaks of the natural influence arising out of legitimate relations. But we should do violence to the morality of the law, and therefore to the law itself, if we should apply this rule to unlawful as well as to lawful relations; for we should thereby make them both equal in this regard at least, which is contrary to their very nature. If the law always suspects and inexorably condemns undue influence, and presumes it from the nature of the transaction, in the legitimate relations of attorney, guardian, and trustee, where such persons seem to go beyond their legitimate functions, and work for their own advantage, how much more ought it to deal sternly with unlawful relations, where they are, in their nature, relations of influence over the kind of act that is under investigation. In their legitimate operation, those positions of influence are respected; but where apparently used to obtain selfish advantages, they are regarded with deep suspicion; and it would be strange if unlawful relations should be more favorably regarded.

And the voice of the law on this general subject is distinct and emphatic, transmitted through many generations, and embodied in many Latin maxims, of which the following are

some: *Nemo commodum capit de injuria sua. Nemo ex proprio dolo consequitur actionem. Frustra legis auxilium petit, qui in legem committit. Pacta quæ contra bonos mores sunt nullam vim habent. Ex dolo malo, ex malificio, ex turpi causa, ex pacto illicito, non oritur actio. Ex injuria non oritur jus. Pacta quæ turpem causam continent, non sunt observanda. In odium spoliatoris, omnia præsumuntur.* All which may be summed up in one sentence: No one shall derive any profit through the law by the influence of an unlawful act or relation.

The ordinary influence of a lawful relation must be lawful, even where it affects testamentary dispositions; for this is its natural tendency. The natural and ordinary influence of an unlawful relation must be unlawful, in so far as it affects testamentary dispositions favorably to the unlawful relation, and unfavorably to the lawful heirs. Ordinary influence may be inferred in both cases, where the nature of the will seems to imply it; but in the former it is right, because the relation is lawful; and in the latter it may be condemned, together with its effects, because the relation is unlawful.

It is not inconsistent with this, that it has been decided that the devise of a wife to her second husband was not affected by the fact that she knew she had a husband living at the time of her second marriage, even though the second husband heard of it before her death; for this shows no conscious transgression of law by him in his marriage with her, and her heirs could not set up her fraud on him as a reason for avoiding her will: *McMahon v. Ryan*, 20 Pa. St. 329.

There can be no doubt that a long-continued relation of adulterous intercourse is a relation of great mutual influence of each over the mind and person and property of the other. History abounds with proofs of it, and it requires no very long life, or very close observation of persons around us, in order to reveal the fact. Our divorce law of 1815 shows its abhorrence of the crime, and its influence, by forbidding any one divorced for adultery from marrying his or her *particeps criminis* while the injured consort is living, and by disabling a woman thus divorced from devising or conveying her property, if she cohabit with her paramour. And the common law, though it allowed children born before marriage to be legitimated by a subsequent marriage, refused this privilege to children born of adulterous intercourse, and did not allow even a devise in their favor from the guilty parent.

If, then, there was such a relation between the testator and

Mrs. Bolton, at the time of the making of the will, as was offered to be proved, we think that that fact, taken in connection with the devise to Mrs. Bolton's daughters, is evidence of an undue influence exerted by her over the testator, and affecting the dispositions of his will, and that it may justify a verdict against the validity of the will. I have, myself, thought that it raised a presumption of law of undue influence, but we do not so decide, but leave it as a question of fact merely. We are therefore of the opinion that the evidence offered ought to have been admitted.

Judgment reversed, and a new trial awarded.

IT IS NOT SUFFICIENT TO PROVE UNDUE INFLUENCE upon a testator by the mother of an illegitimate child, which is named in a will as the legatee, if it is proved that he and she unlawfully cohabited together. That fact is only a circumstance tending to prove such undue influence: *Wainwright's Appeal*, 89 Pa. St. 225; *Rudy v. Ulrich*, 69 Id. 181, citing the principal case. This circumstance should be passed upon by the jury: *Main v. Ryder*, 84 Id. 225, citing the principal case.

ROCKAFELLOW v. BAKER.

[41 PENNSYLVANIA STATE, 319.]

EQUITY WILL NOT GRANT RELIEF where a merely false assertion of value is made by a vendor to a vendee, where no warranty is made or intended. There is no confidential relations between buyer and seller.

CONCEALMENT OR SUPPRESSION BY VENDOR OF MATERIAL FACTS, which he is bound to communicate to his vendee, is a fraud; but a failure to communicate facts which are accessible to both is not.

THE facts are stated in the opinion.

S. Newton Pettis Silvester, for the appellant.

G. Church, for the appellee.

By Court, WOODWARD, J. Baker, a cabinet-maker, having invented and obtained a patent for an "improved bedstead fastening," sold to Rockafellow, the plaintiff, an assignment of the patent for the states of New York and Michigan, in consideration whereof Rockafellow conveyed by deed to said Baker in fee two lots in the borough of Cochranton, Crawford county. After making unsuccessful efforts to dispose of his patent within the territory of the two states named, Rockafellow tendered a reconveyance of it to Baker, and demanded back his lots. Baker refused to accept return of the patent right or to reconvey the lots, and thereupon Rockafellow filed this bill

in equity, praying that his deed to Baker may be canceled and the lots restored to him.

The grounds on which the bill is founded are the fraudulent representations of Baker, but the testimony failed to show that he made any false representations to Rockafellow which induced the purchase. He declared to the hands in his shop and to others that he believed the bedstead fastening "a good thing," "a first-rate thing, as he believed," and a "valuable improvement," but there was no evidence that he ever expressed such opinions to Rockafellow. It is insisted, however, that the plaintiff was deceived by the false representations contained in the specification and patent. In the first of these documents, Baker claimed to have invented a new and "improved bedstead fastening," and in the patent it is recited that he had invented "a new and useful improved bedstead fastening." The plaintiff alleged that it was neither a new nor useful improvement, and it was shown that Baker did not use it himself in building bedsteads, and that it was not a useful improvement.

No doubt the thing was worthless. No doubt the plaintiff parted with his property most foolishly. If the suit were upon an executory contract, we would not enforce it. The total failure of consideration would be a sufficient reason. And such ruling would be according to the doctrine of *Bellas v. Hays*, 5 Serg. & R. 427 [9 Am. Dec. 385], *Geiger v. Cook*, 3 Watts & S. 266, and numerous other cases cited in the argument. But the contract is not executory. It has been fully executed by the parties. They ask no aid of equity to enforce it. Our interposition is invoked, not to carry out and accomplish what the parties have begun, but to undo what the parties have accomplished.

How narrow the grounds are upon which a court of equity will interpose for such a purpose, and how cautious and reluctant its steps will be in that direction, were fully shown in *Graham v. Pancoast*, 30 Pa. St. 97, and *Nace v. Boyer*, Id. 109. Nothing but fraud or palpable mistake is ground for rescinding an executed contract. But there is neither fraud nor mistake in the legal sense of these terms, when a buyer of an article which he finds in market has a full opportunity to examine it, and when the means of information relative to facts and circumstances affecting the value of the commodity are equally accessible to both parties. There is no confidence between buyer and seller, unless a warranty be demanded and

given. They deal at arm's-length. They use not each other's eyes, but each his own. The seller is allowed to express freely his opinions of the value of his wares; the buyer is at equal liberty to answer that it is naught. If there be an intentional concealment or suppression by either party of material facts which he is bound to communicate to the other, there is fraud; but neither party is bound to communicate that which is equally accessible to both. The state of the markets, the present and prospective value of a particular commodity, are among the things which are alike open to both buyer and seller, and neither is bound to instruct the other: *Myers v. Drake*, 10 Watts, 110. A mere false assertion of value, when no warranty is intended, is no ground of relief to a purchaser, because the assertion is matter of opinion, which does not necessarily imply knowledge, and in which men may differ. Every person reposes at his peril in the opinion of others, when he has equal opportunity to form and exercise his own judgment. *Simplex commendatio non obligat*: 2 Kent's Com. 633.

Baker's commendations of his invention, whether expressed to his neighbors, or implied from the terms of his application and patent, were not such as to entrap a reasonably prudent man into the purchase of a worthless article, nor were they employed with intent to deceive the plaintiff. He bought with his eyes wide open, and upon his own judgment, and he paid voluntarily for what he bought. It is no part of the duty of a court of equity to relieve a purchaser from a foolish bargain after it has been fairly consummated.

The decree is affirmed.

THERE IS NEITHER FRAUD NOR MISTAKE in the legal sense of those terms, when the buyer of an article, which he finds in the market, has a full opportunity to examine it, and when the means of information relative to facts and circumstances affecting the value of the commodity are equally accessible to both vendor and vendee: *Geddes's Appeal*, 80 Pa. St. 462, citing the principal case.

EQUITY WILL NOT INTERFERE where there is no fraud or mistake, etc., in making a contract: *Lynch's Appeal*, 97 Pa. St. 353, citing the principal case.

CONTRACT IS NOT RENDERED VOID on account of false representations, if each party to it had equal means of ascertaining the fact: *Bell v. Byerson*, 77 Am. Dec. 142, note 144.

HAYS v. KENNEDY.

[41 PENNSYLVANIA STATE, 373.]

PHRASES "ACT OF GOD," "INEVITABLE ACCIDENT," "UNAVOIDABLE DANGERS of river navigation," etc., discussed and distinguished.

CARRIER OF GOODS, who in his bill of lading exempts himself from liability, if loss happens by reason of unavoidable dangers of navigation, is not liable for loss entailed by reason of a collision in which he is free from blame. This exception exempts the carrier from all loss by dangers which he cannot avoid, although he uses due diligence in trying to avert it.

THE facts are sufficiently stated in the opinion.

Hamilton and Acheson, for the plaintiff in error.

Thomas Ewing, for the defendant in error.

By Court, LOWRIE, C. J. By a collision between two steamboats on the Ohio river, one of them was sunk, without any carelessness on its part, and by reason of carelessness on the part of the other; are the owners of the sunk boat liable, as carriers, for goods lost by the accident, under a bill of lading that contains the exception of "the unavoidable dangers of the river navigation"?

The counsel have thought it necessary to discuss the question, whether or not this exception in the contract in any degree varies the liability of the carriers from what it would be at common law, or without the exception; and they have discussed it with great ability and research. With their assistance, we find that this question has been very often considered, and that it cannot yet be regarded as finally settled either way. Courts, judges, and writers on law have, in the following instances, expressed the opinion that the exception of "unavoidable accidents" is exactly equivalent to the exception of the common law, "act of God or of the public enemies:" Story on Bailments, sec. 25; Angell on Carriers, sec. 167; 1 Kent's Com. 826; 1 Bell's Com. on Scotch Law, 559; *Williams v. Grant*, 1 Conn. 487 [7 Am. Dec. 235]; *Crosby v. Fitch*, 12 Id. 410 [31 Am. Dec. 745]; *Sprowl v. Kellar*, 4 Stew. & P. 388; *Jones v. Pitcher*, 3 Id. 135, 172 [24 Am. Dec. 716]; *Faulkner v. Wright*, Rice, 107; *Colt v. McMechen*, 6 Johns. 168 [5 Am. Dec. 200]; *Elliott v. Rossell*, 10 Id. 1 [6 Am. Dec. 306]; *Gordon v. Little*, 8 Serg. & R. 562 [11 Am. Dec. 632]; *Morrison v. Davis*, 20 Pa. St. 171 [57 Am. Dec. 695]; *Fish v. Chapman*, 2 Ga. 849 [46 Am. Dec. 393]; *Natchez Ins. Co. v. Stanton*, 2 Smed. & M. 572 [41 Am. Dec. 592]; *Reaves v. Waterman*, 2 Speers,

197 [42 Am. Dec. 364]; *Walpole v. Bridges*, 5 Blackf. 222; *Smyrl v. Niolon*, 2 Bailey, 421 [23 Am. Dec. 146]; *Howerin v. Blythe*, 1 McCord, 360; *Marsh v. Blyth*, 1 Nott & M. 170; *Cameron v. Rich*, 4 Strobb. 168 [53 Am. Dec. 670]; *New Jersey S. N. Co. v. Merchants' Bank*, 6 How. 381; and the following express the contrary opinion: *Atwood v. Reliance T. Co.*, 9 Watts, 88 [34 Am. Dec. 503]; *Fergusson v. Brent*, 12 Md. 9 [71 Am. Dec. 582]; *Mershon v. Hobensack*, 22 N. J. L. 372; *Ewart v. Street*, 2 Bailey, 157 [23 Am. Dec. 131]; *Plaisted v. Boston & K. S. N. Co.*, 27 Me. 133; *McArthur v. Sears*, 21 Wend. 190; *Turney v. Wilson*, 7 Yerg. 340 [27 Am. Dec. 515]; *Newby v. Wiltshire*, 4 Dougl. 291; *Barclay v. Gana*, 3 Id. 389; S. C., 26 Eng. Com. L. 358, 157; *Forward v. Pittard*, 1 T. R. 27. Mr. Wallace, in the American edition of Smith's Leading Cases, vol. 1, p. 315, takes the same side, in a very careful and learned annotation of the case of *Coggs v. Bernard*.

A careful study of these cases exhibits a degree of confusion of thought in the judicial administration of this class of cases that must, while it lasts, breed much discord in decisions. Some treat the phrases "inevitable accident," "perils of the sea, navigation, or road," as entirely equivalent to the phrase "act of God," as used by lawyers and judges; and others treat them as expressing different ideas. Again, some treat them as identical terms, for the purpose of making "inevitable accident" mean "act of God," in the sense of a sudden and violent act of nature, as lightning, tempests, etc.; while others make them equivalent for the purpose of making "act of God" mean any accident which the carrier cannot by proper care, foresight, and skill avoid. And many of them overlook entirely the common custom of merchants, which is the common law in such matters, that all bills of lading, and all the printed forms of them, contain the exception against losses by inevitable accident, perils, or dangers of the sea or road, etc. No man expects any other form, unless when he specially contracts for it; and therefore no man is in danger of being caught up by the technical phrase "act of God," unless when he has failed to sign the usual bill of lading. If he signs the bill, he is held according to the usual custom of commerce; he ought to be held no otherwise when he fails to sign it.

Surely all this ought to lead us to suspect that there has been some mistake of the meaning of the term "act of God," since it has led to such a conflict of decisions with each other, and especially with the well-known usages of commerce. We

suppose there never was a time when bills of lading did not contain the exception against the inevitable dangers of the sea or road, though the law always implied it. We pick up the evidence of it as far back as 1629 and 1670: *Williams v. Hide*, Palmer, 551; *Mors v. Slew*, 3 Keb. 73; and doubt not that it may be much more remotely traced.

The earliest use of the term "act of God" that we can find in our law books is by Sir Edward Coke, 1 Co. 97 b, in 1581, in *Shelley's Case*, speaking of the death of a man; and he seems to have been fond of it, for he uses it often afterwards: *Blumfield's Case*, 5 Id. 87 a, 22 a; 1 Inst. 206 a, also meaning death; and *Keighley's Case*, 10 Id. 139 b, where it is applied to a sudden tempest breaking down sea-walls, and refers to the statute, where the term is "inevitable dangers or necessity, without any fault of him who is bound to repair." Moreover, Coke used the phrase "the act of God excuses" as equivalent to *impotentia excusat legem*, and also as equivalent to an accident which is "so inevitable that by no providence or industry of him who is bound, it can be prevented;" or, as in *Shelley's Case*, *supra*, "which no industry could avoid nor policy prevent." Again, he uses the phrase in 1601 as applicable to a sudden storm: 1 Bulst. 280; *Le Case de Gravesend Barge*, 1 Roll. Rep. 79; and certainly that is one of the many kinds of inevitable accidents that may be so described.

The phrase "act of God" is used by other judges in 1629, *Williams v. Lloyd*, 1 W. Jones, 179, *Williams v. Hide*, Palmer, 548, as applicable to the death of a horse, in deciding that the death of a borrowed horse excuses the return of him; and again, in 1718, it means a tempest: *Aimes v. Stevens*, 1 Stra. 128. It is used also by the judges in *Coggs v. Bernard*, Id. Raym. 909, in 1704; but they do not define their meaning in using it, and the case did not require it, and they gave no indication that they attached to it any other than what had been its usual meaning. Holt, C. J., in his opinion, refers to *Mors v. Slew*, 3 Keb. 72, 112, 135, S. C., *sub nom. Morse v. Slue*, 1 Vent. 190, 238, as the leading case on the subject, *Heskett v. Lee*, 1 Mod. 49, in 1670; and there the court say, *Mors v. Slew*, 3 Keb. 114, that the carrier is "not liable for inevitable accident, when it is *vis cui resisti non potest*;" and Hale, C. J., *Morse v. Slue*, 1 Vent. 238, classes pirates, storms, etc., as *damnum fatale*, and says nothing of "act of God." Holt argued the case, and does not use the phrase, but much reference is made to the Roman law, and no intimation of its differing from our own.

Many other instances in which the phrase is used may be found in Broom's Legal Maxims, 171. So far as we have traced it, the maxim, *Actus Deinemini facit injuriam*, does not appear to be different from others; such as, *Lex non cogit ad impossibilia*, *impotentia excusat legem*, and the maxims of the Roman law, *Impossibilium nulla obligatio est*, Dig. 17, 50, 185, and others directly applicable to this subject: *Impium est casum fortuitum in alicujus detrimentum admitti*: Inst. 3, 3, 4; *Propter majorem vim, majoresve casus non tenetur, si modo non ipsius culpa is casus intervenit*: Id. 3, 14, 2; *Quæ fortuitis casibus accidunt, cum prævidere non possint, nullo bonæ fidei judicio præstentur*: Cod. 4, 24, 6; Dig. 50, 8, 2, 7.

After our separation from England, in 1785, Lord Mansfield, in *Forward v. Pittard*, 1 T. R. 27, introduced a somewhat different view; holding that, to be an act of God, it must be such a one "as could not happen by the intervention of man, as storms, lightning, and tempests." He calls this a liability independent of the contract, and says it appears in all the cases for the last hundred years; and yet we confess that we have not been able to discover that this statement has even a general accuracy. And there is no need of a warranty or insurance independent of the contracts, for it is expressed in them in the words "safely to carry and to deliver in good order," which are to be found in all carriers' contracts, when they are written; and which are therefore implied as within the intention of the parties, when the contract is not written. The contract of insurance in these words is quite absolute; but it is not reasonable to receive it so, for it is not so intended; and the difficulty has always been to define the exceptions to it.

The usual exception in the contracts is against the perils of the sea, or road, or river, or unavoidable accidents, and such like, and lawyers have changed these into the general term, "act of God;" but they have not altered thereby the terms of the contract. "Act of God" no more excludes human agency than such terms as *Deo volente*, *Deo juvante*, *ex visitatione Dei*, "Providential dispensation," or the Roman terms, *fataliter*, *divinitus*, *casus fortuitus*, *damnum fatale*, all of which originally referred to the intervention of the gods, in the sense that the appropriate human agency was powerless. It is only by an arbitrary definition of the term that we depart from the meaning of the contract, and fall into difficulties in administering rights under it.

Unquestionably, there is a warranty or insurance in the con-

tract, for it is to carry and deliver safely, and this involves a warranty of exact diligence in the duty, and of the sufficiency of all the means of carriage, and all this is usually written out in all formally drawn charter-parties, and the Romans expressed the idea by the word *præstare*. And it is impossible to exclude the intervention of man from those accidents which are called acts of God. When rights depend on the life of a man, they are determined by his death, if it be not caused by him who owed the duty; and this death is called the act of God, whether it proceeds from nature, accident, carelessness, or suicide.

There is the intervention of man in a loss by tempest; for he chooses the route that brings the vessel where the tempest rages, he made the masts and sails, and sets the sails that break away in the storm or drive the vessel under; he made the ship that is too weak or too small to live in such a tempest. It is by the intervention of man that vessels bound to and from England keep so far north as to fall in with icebergs, and sometimes be destroyed by them. There is human intervention when a vessel is driven by a storm against a wharf, or pier, or bridge constructed by men. If a storm drives a vessel from her mooring, by dragging her anchor or parting her cable, it is because the human means of holding her are insufficient. If a death happen by an inevitable accident in the working of mines or other excavations, or in conducting steam-works, or by the fall of a house or of some fragment of it, there is human intervention, and yet it may very properly be reported as a death *ex visitatione Dei*. It is impossible, therefore, to define inevitable accidents by excluding the element of the intervention of man; for this element itself needs definition. In all the instances we have given, the accident may be legally inevitable, even though there be the intervention of man having some influence in it.

No man warrants, or is ever expected to warrant, that the route he takes is the very best, or that his crew are perfect, or that his vessel is perfectly secure; he does his duty in all these particulars, if he can bear the test of the ordinary or customary standards. If a man ships his goods on a raft or flat or oyster boat, he does not expect his warranty to make them as secure as they would be in a first-rate East Indiaman, or the best Liverpool packet.

In the narrow sense that has recently been attributed to the terms "act of God" and "inevitable accident," it is no excuse

that a vessel strikes upon an unknown snag or bar or rock in the ordinary route of travel, for here is no violent act of nature; and yet this has often been held a valid excuse: *Eveleigh v. Sylvester*, 2 Brev. 178; *Faulkner v. Wright*, 1 Rice, 107; *Johnson v. Friar*, 4 Yerg. 48 [26 Am. Dec. 215]; *Gordon v. Buchanan*, 5 Id. 72; *Smyrl v. Niolon*, 2 Bailey, 421 [23 Am. Dec. 146]; *Williams v. Grant*, 1 Conn. 487 [7 Am. Dec. 235]; *Jones v. Pitcher*, 8 Stew. & P. 135 [24 Am. Dec. 716]; *Sprowl v. Kellar*, 4 Id. 382; though there are contrary decisions, misled by the distinction which we have been discussing. Nobody expects a carrier to warrant against such accidents; this is the business of insurers. Nobody doubts this meaning of perils of the sea, and inevitable accidents, in insurance contracts. Why should it be different in carriers' contracts?

We can never administer rights of contract justly by arbitrarily infusing into them terms which are never intended by the parties, which are not sanctioned by the actual customs of the people, and which are not involved in the very nature of the relation created by the contract.

It is by a proper administration of the remedy that we secure the rights intended to be contracted for; and the main principle of the remedy is, that from the very nature of the relation, the burden of proof of a loss by inevitable accident is thrown upon the carrier. He must prove, not only an accident which the law admits as inevitable in its character, but also that he was guilty of no fault in falling into the danger, or in his efforts to extricate himself from it.

Pertinent to this subject we have some very wise remarks of Sir William Scott, in the case of *The Generous*, 2 Dods. 323, Broom's Maxims, 181, which we may be allowed to quote: "The law itself and the administration of it must yield to that to which everything else must bend—necessity; the law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling men to impossibilities, and the administration of laws must adopt that general exception in the consideration of all particular cases. In the performance of that duty, it has three points to which its attention must be directed. In the first place, it must see that the nature of the necessity (or accident) pleaded be such as the law itself would respect, for there may be a necessity that it would not. A necessity created by a man's own act, with a fair previous knowledge of the consequences that would follow, and under circumstances

which he then had a power of controlling, is of that nature. Secondly, that the party who was so placed used all practicable endeavors to surmount the difficulties which already formed that necessity, and which on fair trial he found insurmountable. I do not mean all the endeavors which the wit of man, as it exists in the actual understanding, might suggest; but such as might reasonably be expected from a fair degree of discretion and an ordinary knowledge of business. Thirdly, that all this shall appear by distinct and unsuspected testimony; for the positive injunctions of the law (or terms of the contract), if proved to be violated, can give way to nothing but the clearest proof of the necessity that compelled the violation."

Theft from a carrier, or robbery of him, while he is within the protection of the state, *Mors v. Slew*, 3 Keb. 135, is not an excuse that the law respects; for by the very nature of his contract, the carrier, by himself or his agents, is bound to be always with the goods during their carriage, and the law presumes, and must in all ordinary cases presume, that if he is watchful, the ordinary police of the state will be entirely adequate for his protection. It is, therefore, because he is presumed, and almost conclusively presumed, to be in fault in such cases, that he is held liable; and not because he has a remedy over against the wrong-doer, or the township, or hundred: *Lane v. Cotton*, 1 Salk. 143. He is not liable when robbed by pirates on the high seas or by the public enemies, because against these he has no police protection, and there is no presumption of fault on his part.

It is important to have a clear idea of this. The carrier is bound to carry safely, and if he fail to do so, the burden of proof of a valid excuse is cast upon him. If he show a cause which the law admits to be sufficiently serious to be called inevitable, he has merely prepared the way for showing that he used all possible care. At this stage of the case, the law does not presume any fault on his part; but simply demands that he shall complete his excuse by showing that, in the midst of the danger, he exerted all the skill and care he could to avoid it. If this be made out, then he stands entirely without fault before the law, having performed his whole duty under his contract, as it is interpreted by the law according to the customs of merchants and carriers.

Now, if instead of charging him because his excuse leaves him still in fault, we charge him because he has a remedy over, *Anonymous*, Owen, 57, *Woodlife's Case*, Moore, 462, then we

should have to inquire of the fact, Has he such a remedy as can be of any avail to him? He has none, of course, in a case of inevitable collision, without fault on either side. He may have none where the other vessel is sunk by the accident. He may have none, if the collision happened off the coast of Africa, or his vessel be seized by order of some foreign government. He can have none that is available, if the opposite parties to the collision are irresponsible. Surely we have no evidence in commercial customs that a carrier insures against such accidents, and for such a reason. And if such were the reason, then there is no insurance when both colliding vessels are free from fault, for then neither has any remedy.

And certainly the law cannot impose such a liability for such a reason; for one state cannot make laws for another state, as it would do by saying that the injured vessel shall have its remedy against the wrong-doer wherever he may be found. If the law imposes the insurance, "independent of the contract," instead of enforcing the terms that are involved in it, then the insurance cannot reach beyond the state which imposes it, for no state enforces the mere law of another state, while all civilized states do enforce contracts made abroad, according as those contracts were understood in the place where they were made.

We might easily carry out these views so as to show that the defendants, being without fault in this collision, are not liable; but we prefer not to do it. We rather wish that what we have said may be useful in leading to an investigation that will expose, in a conclusive way, the fundamental mistake which has led to so much discordance as prevails in the decisions of courts, and between many of them and the actual customs of trade. We can decide this case well on other grounds.

We are quite satisfied that the weight of authority and of reason shows that the ordinary exceptions in bills of lading of unavoidable accidents have a much larger sphere than that which is attributed to the term "act of God," by the very strict interpretation of some writers and judges; while, for the present, we think that expression has been unduly narrowed.

There are cases where there is no bill of lading, or where the ordinary exception of perils of the sea does not appear, and where the innocent carrier is held liable: *Lawrence v. McGregor*, 1 Wright, 193; or where both were innocent, and both liable: *Mershon v. Hobensack*, 22 N. J. L. 372; *Plaisted v. Boston and K. S. N. Co.*, 27 Me. 133 [46 Am. Dec. 587]. These

cases must proceed upon the notion that there is an insurance against collision and other analogous accidents, where, at least, the usual exceptions are not provided.

There are cases where there is the exception of perils of the sea: *Marsh v. Blythe*, 1 McCord, 360; S. C., 1 Nott & M. 170; where both were innocent in the collision, and yet were held liable. Those cases must proceed on the notion that there is a warranty against collision, even when the usual exception is expressed.

But several cases decide, and almost all careful text-writers agree, that the carrier who is not in fault in the collision is not liable under a bill of lading containing the usual exceptions: *Buller v. Fisher*, Peake's Add. Cas. 183; S. C., 3 Esp. 67; *Whitesides v. Thurlkill*, 12 Smed. & M. 599 [51 Am. Dec. 128]; Story on Bailments, sec. 514; 1 Bell's Com. 559; 2 Arnould on Ins. 804; *McArthur v. Sears*, 21 Wend. 199; *Smith v. Scott*, 4 Taunt. 126; Abbott on Shipping, 240; Chitty on Carriers, 171.

Whatever may be said, therefore, respecting the meaning of the phrase "act of God," we think it can have no application in a case where the parties have expressly provided a different rule of liability, by expressing themselves in terms that cannot reasonably be interpreted in the narrow sense often attributed to that phrase. When they provide that they shall not be liable for the unavoidable dangers of the navigation, they mean dangers that are unavoidable by them, supposing that they have exercised all the precaution, care, and skill that the law usually demands of common carriers. They mean that they shall not be answerable as insurers against accidents which the law respects as inevitable; but that if they prove such an accident falling upon them without any previous fault of theirs, and that they had a proper vessel and crew, and did all in their power to extricate themselves from the danger, they shall be as free from liability as they are from fault. We think, therefore, that this case was rightly decided.

Judgment affirmed.

"ACT OF GOD" IS NO EXCUSE for not performing a contract, unless it is so stated in the contract: *Supt. of Public Schools v. Bennett*, 72 Am. Dec. 373, note 378.

NOTHING WILL RELIEVE COMMON CARRIER from liability for loss, except the act of God or of public enemies, or that which arises from no event provided for in his contract: *Fergusson v. Brent*, 71 Am. Dec. 582, and note 587, 588, where this subject, inevitable accident, etc., is discussed, and authorities collected; *Cramell v. Ship Foodick*, 77 Id. 190, note 194; *Welch v. P. & F. W. R. R. Co.*, 75 Id. 490, note 497.

CASES
IN THE
SUPREME COURT
OF
RHODE ISLAND.

ALDRICH v. HOWARD.

[7 RHODE ISLAND, 87.]

DESTRUCTIVE NUISANCE MAY BE ENJOINED, although it is also the subject of ordinary legal redress; nor is a bill to enjoin such nuisance demurrable because it does not state that the rights of the parties have been settled by a judgment at law.

BILL IN EQUITY TO ENJOIN ERECTION OF LIVERY STABLE, WITH PRAYER FOR GENERAL RELIEF, and alleging that the stable, by its proximity, will render the complainant's house untenable, break up his business, and diminish the rents of his stores, is not demurrable for want of equity.

DEMURBER to bill in equity to restrain alleged nuisance. The opinion sufficiently states the case.

James Tillinghast and Bradley, for the defendant.

Currey and R. W. Greene, for the complainant.

By Court, **AMES, C. J.** This demurrer cannot be sustained for want of equity in the bill. The bill states, in substance, that the stable which is in the course of erection by the defendant is designed to be used by him as a livery stable; and that being so used, it will, from its proximity to his dwelling-house, hotel, and stores, and by its disagreeable and unwholesome effluvia, its noise, flies, and other nuisances, cause him irreparable damage, by rendering his house untenable, by breaking up the business, and by diminishing the rents of his hotel and stores. These are allegations of facts, into the truth of which we are not to inquire upon this demurrer; but supposing them to be true, to ask ourselves, if the defendant's stable would

not be a nuisance against which the complainant would be entitled to equitable relief, not, indeed, in the special mode prayed for, but in some appropriate mode, under his prayer for general relief? We cannot say, as a matter of law, that a livery stable placed so near the complainant's dwelling-house and hotel will not, by the unwholesome and disagreeable effluvia attributed to it in the bill, produce all the effects therein alleged, destructive to the complainant's property; and the demurrer admits that it will, as a matter of fact. If this be so, how can we say that a case may not be made out under the bill, which will require us to interpose for the complainant's protection?—which is the test whether a bill in equity is demurrable for want of equity, as decided in *Dike v. Greene*, 4 R. I. 285.

A destructive nuisance may certainly be enjoined by a court of equity, although it is also the subject of ordinary legal redress. Nor is it true that a bill to enjoin such a nuisance is demurrable because it does not state that the rights of the parties, in support of the bill, have been settled by a judgment at law. It may be very proper that they should be, if uncertain, before the court affords its specific relief; but the title of the plaintiff to the relief he asks may be admitted by the answer, as it is by this demurrer, and then why should it be further ascertained to induce the action of the court? As late as 1851, Sir Richard Kindersley, vice-chancellor, said that it was true that equity will only interfere in case of nuisance, where the thing complained of is a nuisance at law—and that there was no such thing as an equitable nuisance—but asks: "Is it a ground of demurrer that the matter has not yet been tried at law? It may be ground, and is ground very often, for refusing an injunction upon motion; but is it ground of demurrer? No; I am not aware of any cases in which it has been so determined:" *Soltau v. De Held*, 9 Eng. L. & Eq. 117; and see *Sprague v. Rhodes*, 4 R. I. 301.

Our attention was directed by the counsel for the defendant to two cases, in which it was said that demurrers were sustained to such a bill as this: *Kirkman v. Handy*, 11 Humph. 406 [54 Am. Dec. 45]; and *Harrison v. Brooks*, 20 Ga. 537. Upon looking into these cases, we find that in the first the demurrer was disallowed, and the bill went to a hearing; and in the other, that the case came before the supreme court of Georgia, after answer upon exceptions to the rulings of a judge

of the superior court of that state, upon a motion to dissolve, or modify by giving security, a special injunction that had been granted in it, upon the ground that the equity of the bill had been fully met by the answer, which the judge below had overruled.

In fine, without touching the other questions which have been argued, and without expressing an opinion upon the merits of this case, which we reserve until we can know what in truth the case is, we can only express our regret at the delay caused by the interposition of this demurrer, and overruling it, order the defendant to answer the bill; the question with regard to the costs of this term being reserved.

REMEDIES AGAINST NUISANCES IN GENERAL: *Gray v. Ayres*, 32 Am. Dec. 107; *Stetson v. Faxon*, 31 Id. 123; *Low v. Knowlton*, 45 Id. 100; *Pillsbury v. Moore*, 69 Id. 91; *Crommelin v. Coxe*, 68 Id. 120.

WHEN INJUNCTION WILL BE GRANTED TO PREVENT NUISANCE: *Welcott v. Melick*, 66 Am. Dec. 790; *Rosser v. Randolph*, 31 Id. 712; *Bigelow v. Hartford Bridge Co.*, 36 Id. 502; *Coker v. Birge*, 54 Id. 347; *Ellison v. Commissioners*, 75 Id. 430, 433, note; to restrain irreparable injury: *Goodrich v. Moore*, 72 Id. 74, 78, note; to abate private nuisance: *St. James's Church v. Arrington*, 76 Id. 332; *Earl v. De Hart*, 72 Id. 395, 401, note.

WHEN ERECTION OF STABLE DEEMED NUISANCE, AND REMEDY AGAINST: *Coker v. Birge*, 54 Am. Dec. 347, 350, note; *Whitney v. Union Railway Co.*, 71 Id. 715; *St. James's Church v. Arrington*, 76 Id. 332.

REMEDY FOR NUISANCE IN WRONGFUL USE OF BUILDING: *Barclay v. Commonwealth*, 64 Am. Dec. 715.

THE PRINCIPAL CASE IS CITED to the point that whether a stable is or is not a nuisance depends upon the mode of its construction, its proximity to residences, and the manner in which it is used, in *Keiser v. Lovett*, 35 Ind. 243; *Pennoyer v. Allen*, 56 Wis. 510.

WINSLOW v. BROWN.

[7 RHODE ISLAND, 36.]

ONE JOINT DEBTOR IS NOT DISCHARGED, AT COMMON LAW, BY PART PAYMENT MADE BY OTHER JOINT DEBTOR, in the absence of any technical difficulties connected with the remedy; such payment having been made, not in satisfaction of the joint debt, but merely for the debtor's own personal discharge therefrom.

NOTE, AND CONTRACT AND PART PAYMENT DISCHARGING ONE OF JOINT PROMISORS, were made in Massachusetts, by parties there resident: *Held*, in action on the note in Rhode Island, that such contract and payment are to be judged, as to their validity and effect, by the law of the

former state, and that the payment operated to discharge only so much of the debt as it paid, and not the part of the joint debtor discharged, as provided by the revised statutes of the latter state, chapter 114.

ASSUMPSIT upon a promissory note, made jointly by defendant and his father, in the state of Massachusetts, where all the parties at the time resided. Defendant afterwards removed to Rhode Island, where suit was brought against him on the note, his father and the plaintiff continuing to reside in Massachusetts. By an agreement between defendant's father and the plaintiff, made prior to the suit, the former paid the latter a sum of money "for his name" on the joint note, the sum being less than his part of the joint debt. Neither party understood that the payment was to discharge the liability of the son, or any action which might be brought for its enforcement. Case submitted to the court.

Borden, for the defendant.

T. C. Greene, for the plaintiff.

By Court, AMES, C. J. We have already decided that a part payment, made by one joint debtor, not in satisfaction of the joint debt, but merely for his personal discharge therefrom, will not, at common law, in the absence of technical difficulties connected with the remedy, operate as a discharge of the other: *Heyer v. Carr*, 6 R. I. 45. In this case, the fifty dollars paid by the father was paid merely "for his name" upon the joint note; and as there was no technical release of the father, and indeed he is no party to this suit, there seems to be no reason why any greater effect should be given to his discharge than was intended in his contract with the plaintiff.

The note sued, and the contract and part payment discharging one of the joint promisors, were made in Massachusetts, by parties there resident, and are to be judged, as to their validity and effect, by the law of that state. We have no evidence that there is, in Massachusetts, any such provision as to the effect of a partial payment by one joint debtor, in compromise of his liability upon the joint debt, as that cited from our statute; and hence it is unnecessary to consider the sufficiency of the letter produced, as a note or memorandum in writing under it. It follows that the plaintiff is entitled to recover against the defendant the amount of his note, less the fifty dollars paid by the other joint debtor thereon for his personal discharge.

EFFECT OF PAYMENT BY ONE JOINT DEBTOR BY NOTE OR OTHERWISE: *Cook v. Field*, 36 Am. Dec. 436; *Estate of Davis*, 34 Id. 574; *Jones v. Johnson*, 38 Id. 760; *Lee v. Fontaine*, 44 Id. 505.

WHEN RELEASE OF ONE JOINT DEBTOR DOES OR DOES NOT RELEASE ALL: *Berry v. Gillis*, 43 Am. Dec. 584; *Williamson v. McGinnis*, 52 Id. 561; *Bosman v. State Bank*, 46 Id. 291; *Benjamin v. McConnell*, Id. 474; *Mathews v. Lawrence*, 43 Id. 665.

PLAINTIFF MAY DISMISS ACTION ON JOINT NOTE AS TO ONE MAKER, although he be principal, and take judgment against the other: *Wilkinson v. Flowers*, 75 Am. Dec. 78.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

JONES AND MACKAY v. MARTIN.

[26 TEXAS, 57.]

PURCHASE BY ATTORNEY, AT SHERIFF'S SALE, UNDER EXECUTION OF WHICH HE HAS CONTROL, is considered by the law as in the twilight between legal fraud and fairness, and should be deemed fraudulent, or in trust for the parties concerned in the sale, upon slight additional facts.

IT IS SCARCELY POSSIBLE TO MAKE FAIR SALE OF PROPERTY FOR FULL VALUE, the sale being in gross, pursuant to a levy upon a mass of property, without any specific description, and embracing undefined and unascertained interests. And the fact of such sale, under such a levy, in connection with the fact that the purchaser was the attorney of the plaintiff in execution, having control of the execution and levy, are sufficient to annul the sale, or to constitute the purchaser a trustee, holding the title in trust for the parties concerned.

MORTGAGEE OF LAND UNFAIRLY SOLD UNDER EXECUTION, whose mortgage was junior to the judgment, has the right to intervene, and pray a foreclosure, in a suit by the party whose property was so sold, brought to annul the sale; and if either the sheriff or his deputy fraudulently combined with the purchaser at the sale, to the prejudice of the plaintiff's right, he may properly be made a party to the suit.

PARTY MAY ALLEGE AND PROVE, IN SUIT BROUGHT FOR CANCELLATION OF UNFAIR SALE OF HIS LANDS UNDER EXECUTION, that it was agreed between himself and the purchaser at the sale, defendant in suit, that the latter should buy in the property for the benefit of the former, and give him time to redeem; and evidence of such an agreement should be admitted, although the party apparently acquiesced in the mode of making the sale.

APPEAL from Lavaca. Suit by plaintiff, Jones, for a cancellation of the sale and a reconveyance to him of lands, sold under an execution issued on a judgment against him. The defendant, Martin, who purchased the lands, was the attorney of the plaintiff in execution, having control of the execution

and levy. The judgment against plaintiff was for less than six hundred dollars, and the alleged value of the property levied on more than ten thousand dollars. The petition also alleged that defendant agreed, in consideration of plaintiff's promise to pay him the amount of the execution, with interest and cost, to bid in the property for benefit of plaintiff, and convey it to him; and that, relying upon this arrangement, plaintiff allowed the whole of the property to be put up and sold in mass. Defendant bought the property for nine hundred dollars, taking the sheriff's deed to himself. Plaintiff tendered him the amount of the execution, etc., as agreed, and demanded a reconveyance, which was refused. Defendant denied the alleged agreement, or being in any sense trustee for plaintiff; but admitted the purchase for his own benefit. Mackay intervened in the suit, alleging an indebtedness to him from plaintiff Jones, to secure which the latter gave him a mortgage of later date than the judgment, on part of the lands sold at the sheriff's sale, and purchased by defendant Martin; that the sale to Martin was fraudulent and void; also reciting and charging the facts relative to the agreement between plaintiff Jones and Martin; and praying for a foreclosure of the mortgage, a cancellation of the sale to Martin, etc. By amendment, he also sought to make the sheriff who conducted the sale, and his deputy, parties defendant; charging the latter with fraudulently combining with Martin to procure the property to themselves at a sacrifice. But the court refused to make the new parties as prayed. Evidence offered to prove the agreement between plaintiff Jones and Martin and the value of the property was also ruled out, and verdict and judgment for defendant. Jones and Mackay both appealed.

George W. Smith, for the appellant Jones.

William Martin, and Howerton, Holt, and Stockdale, for the appellee.

Smith and Ford, for the intervenor.

By Court, WHEELER, C. J. The circumstances attending the purchase of the land by the attorney of the plaintiff seem to render it obnoxious to the observations of Chief Justice Robertson, in the case of *Howell v. McCreery*, 7 Dana, 388, and of Chancellor Kent, in *Howell v. Baker*, 4 Johns. Ch. 118, to the effect that such a transaction carries evidence of abuse upon its face.

It is questionable whether a purchase by an attorney under his client's execution, over which he had control, would not be deemed in itself invalid in England. In *Howell v. Baker*, 4 Johns. Ch. 118, the chancellor quotes an observation of Lord Thurlow, to the effect that "no attorney can be permitted to buy in things in a course of litigation, of which litigation he has the management. This the policy of justice will not endure." And the chancellor strongly intimates that the rule disqualifying trustees, solicitors, and attorneys from purchasing at sales brought about by their agency, might justly be applied to the case of an attorney purchasing for his own benefit, at a sale under his client's execution. Waiving the decision of that point, however, the chancellor held that the circumstances under which the purchase was made by the attorney, warranting an inference of unfairness in the sale, were sufficient, when taken in connection with his character as attorney, to constitute him a trustee for the parties whose interests were concerned in the sale, and decreed accordingly. In *Howell v. McCreery*, 7 Dana, 388, the court said they would not go so far as to hold that all such purchases were interdicted by the law, but that "public policy and the analogies of the law require that they should be considered *per se* as in the twilight between legal fraud and fairness, and should be deemed fraudulent, or in trust for the debtor, upon slight additional facts."

It is scarcely possible that a sale in gross, pursuant to such a levy upon a mass of property, without any specific description, embracing undefined and unascertained interests, could be a fair sale of the property for its full value. It seems not to admit of doubt that comparatively inconsiderable distinct parcels of the property, if sufficiently designated and described, would have sold for a sum sufficient to satisfy the execution. Such being the case, the sale of the whole in mass, and in the terms of this extraordinary levy, cannot be deemed otherwise than unreasonable and unjust, and quite sufficient, considering that the purchaser was the attorney of the plaintiff in execution, having control of the execution and levy, to set aside and annul the sale, or to constitute him a trustee, holding the title in trust for the parties whose interests were concerned in the sale—that is, the defendant in execution and plaintiff in this suit, and the intervenor whose mortgage, subsequent in date to the lien of the judgment, gave him an interest. Whatever effect may be ascribed to the presence and silence of the

former at the sale, though he should be deemed by his conduct to have waived the irregularities in the levy and sale, this cannot be said of the intervenor; and as to him, at least, the sale under circumstances so calculated to depreciate the property, and cause it to sell for greatly less than its value, ought to be deemed invalid.

But aside from all question of the validity of the sale in other respects, if in truth there was an understanding, as alleged, between the plaintiff and defendant at the time of the sale, that the former should buy in the property for the benefit of the latter, and give him ten days within which to redeem by paying the money, and this was a question for the jury, the refusal of the former to abide by and carry out this understanding or agreement operated a manifest wrong and injustice upon the latter. The effect of such an understanding would be to induce the debtor to relax his efforts to obtain the money immediately, in order to save his property, or to prevent its sacrifice by procuring the intervention of a friend to buy it in for him, or to induce its sale for its fair value. If known or suspected, it was calculated to repress competition and cause the property to sell for less than it would otherwise have brought. Under such circumstances, the purchaser must be deemed to create a trust in behalf of the plaintiff who had the right to redeem the estate by the payment of the debt; and having made a tender of it, the action was well brought to enforce the right to redeem: *Howell v. Baker*, 4 Johns. Ch. 118.

The giving of the receipt to the defendant for the excess of his bid above the sum required to satisfy the execution, as the money was not in fact paid, could in no way compromise the plaintiff or affect his right; for he was but carrying out, in good faith on his part, the understanding between them.

The tender, as deposed to by the witness Townsend, appears to have been in time, and much more than sufficient in amount, and to have been refused and the right of the plaintiff to redeem denied, unless the plaintiff would pay the defendant a bonus of one thousand dollars to give up the legal advantage supposed to have been obtained. Such a demand was manifestly unjust and oppressive, and the plaintiff was under no legal necessity to accede to it. All the defendant had the right to claim was to be reimbursed the amount expended in satisfying the execution. If, indeed, there was any defect in the tender, it was waived by the failure to indicate

it at the time, and assigning a reason for refusing it, which was unfounded.

The case, as respects the intervenor, is free from the questions which were raised as to the right of the plaintiff, arising from his conduct at the sale. That very conduct, considered in reference to the defendant's agency in the business, affords strong grounds for the interposition of the court in his behalf.

These views lead us to the conclusion that the court erred, both as to the plaintiff and intervenor, in excluding the evidence offered by them respectively.

The allegations of the petition of the intervenor show no sufficient cause for making the sheriff McKinney a party to the suit, since no decree is sought against him. The mere fact that he made the sale could not subject him to a suit. But as to the deputy Ballard, who is alleged to have been a party to a fraudulent combination with the defendant to the prejudice of the plaintiff's right, and is charged with being secretly interested with the defendant in the purchase, and to have received from him a deed to a part of the land, the allegations are insufficient to require him to answer to the action of the intervenor.

The judgment is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

PURCHASE BY ATTORNEY AT SALE UNDER EXECUTION IN FAVOR OF HIS CLIENT: See *Beardsley v. Root*, 6 Am. Dec. 386, and note; *Wade v. Pettibone*, 37 Id. 408, and note; *Averill v. Williams*, 47 Id. 252; *Fisher v. Knox*, 53 Id. 508.

PURCHASE OF LAND AT RECEIVER'S SALE BY ATTORNEY PROSECUTING SUIT IN WHICH RECEIVER WAS APPOINTED: *Chautauque County Bank v. White*, 57 Am. Dec. 442.

WHEN EXECUTION PLAINTIFF, PURCHASING LAND AT SHERIFF'S SALE, SHOULD BE REGARDED AS HOLDING TITLE IN TRUST: *Walker v. McKnight*, 61 Am. Dec. 190.

FRAUDULENT PURCHASER OF LAND AT SHERIFF'S SALE may be treated as trustee by those interested in the property: *Bethel v. Sharp*, 76 Am. Dec. 790.

WHEN EXECUTION SALE OF SEPARATE ADJOINING TRACTS OF LAND IN MASS IS VALID: *Smith v. Randall*, 65 Am. Dec. 475; and see *Rector v. Hart*, 41 Id. 650, and note.

ROSE v. NEWMAN.

[26 TEXAS, 181.]

SALE OF DECEASED PERSON'S ESTATE, TO CARRY OUT PARTITION THEREOF, must be made by the administrator, and if made by a commissioner appointed by the county court for the purpose, conveys no title.

IF SALE OF LANDS FOR PARTITION AMONG HEIRS BECOMES NECESSARY, and there be no administrator, there can be no sale until one is appointed. The estate is vested in the heirs, subject only to such disposition of it as may be necessary to be made by the administrator, under the orders of the court, to pay debts, make partition, and the like.

BUSINESS OF DEPUTY IS TO PERFORM DUTIES OF PRINCIPAL; and a deputy clerk may authenticate instruments for record when his principal is authorized so to do.

APPEAL from Gonzales. Suit to obtain partition of a league and labor of land, plaintiff claiming a one-sixth undivided interest, by virtue of title deraigned from defendant Newman. Defendant Chinault claimed nearly all the tract, also by titles under Newman, and plaintiff conceded his title to a part. But Chinault claimed a further interest of one-third undivided part of the league and labor, originating in a contract in writing between himself and one Lockhart, whereby the former employed the latter to locate his head-right certificate, and clear out the patent from the government, at his own expense, and to be entitled to one third of the land for such service. Lockhart afterward died, and the land was patented to Newman a few years subsequently. The contract above was proved for record before a deputy clerk of the county court. Other statements in the opinion fully present the case. Decree in favor of defendant Chinault.

G. M. Reid, for the appellant.

Stewart, for the appellees.

By Court, **ROBERTS, J.** The evidence was not sufficient to sustain the decree in this case. The proof of the performance of the contract for the location of the land by Lockhart was barely sufficient, if the case rested on that alone. But the title of Chinault to Lockhart's locative interest derived through the commissioner, S. B. Conley, judged by the facts presented in this case, is not complete.

Certain persons representing themselves as the heirs and assignees of the heirs of the estate of Lockhart, represent to the county court of Gonzales county, in a petition filed by them, that the estate had been previously administered and closed;

that a number of land claims, being interests for location, evidenced by bonds, etc., had not been disposed of during the previous administration; that an administration *de bonis non* was then pending; that said claims would be worthless under an ordinary partition amongst those interested in them; that a bond had been given by the heirs for the payment of all the debts due from said estate, and they pray that these claims may be sold without any lien, and that the proceeds be divided amongst those interested. The court granted an order in accordance with their prayer, and appointed S. B. Conley a commissioner to sell said claims and make title thereto, which he did. At said sale, F. Chinault, who was one of the petitioners as assignee, purchased those claims to the amount of over eleven thousand acres of land, as appears by the sale bill, for twenty-eight dollars, one of which was the one third of the league and labor of William Newman, the land now in controversy.

It does not appear for what reason administration of the estate of Lockhart was attempted after it had once been closed. In a similar case, it was held by this court that the administration was void for want of power in the court, and that it was subject to objection collaterally by one who was no party to the proceeding: *Fisk v. Norvel*, 9 Tex. 13 [58 Am. Dec. 128]; see also *Hurt v. Horton*, 12 Tex. 285.

But supposing that it had been shown that the court had full authority to grant the administration, there is another objection to this title in the fact that it was made by the commissioner Conley, instead of the administrator *de bonis non*. However plenary the powers of the county court may be upon the subject of a partition of a deceased person's estate, when a sale of property becomes necessary to carry out the partition, the administrator must sell and execute his deed to divest the estate of the title. The district court might as well appoint a commissioner to levy upon and sell property in satisfaction of a judgment for money, while there was a sheriff, as for the county court to appoint a commissioner to sell the land of an estate while there was an administrator. And if there was no administrator, from death or resignation, there could be no such action of the court until one was appointed. The estate is vested in the heirs, subject only to such disposition of it as may be necessary to be made by the administrator under the orders of the court, to pay debts, make partition, and the like. It is, therefore, not a sale by any one who, through the author-

ity of the county court in the administration of Lockhart's estate, could make a title. Nor are the heirs necessarily estopped by it, so as to make it tantamount to a regular probate sale; for the object of the parties is transparent. It bears upon its face the marks of an extrajudicial proceeding for their own convenience or profit; conforming in nothing, either of form or substance, to a regular proceeding for the partition of a deceased person's estate. It is an effort to use the court as an instrument to do what they could have done themselves if they were the owners of the estate; and that in a way in no degree whatever conformable to the proceeding of partition, as known to the laws of this state. Regarded in this point of view, the county court could not give judicial sanction to any part of the proceeding; and therefore, to complete the title under Conley's deed, it should have been shown that these petitioners were the owners of the estate of Lockhart, as heirs or the assignees of the heirs. For this defect in the proof, the judgment must be reversed.

The point mainly relied on by counsel was the admission in evidence of Newman's bond to Lockhart, as a recorded instrument, it having been proved for record before a deputy clerk of the county court. In *Miller v. Thatcher*, 9 Tex. 482 [60 Am. Dec. 172], it was said, in referring to a question not decided in the case, that a deputy clerk of the county court had no such authority. We are of opinion that he had such authority, and cannot therefore reverse this case on that ground.

In the organization of the courts and tribunals of the republic in 1836, a great variety of duties was imposed upon the clerk of the county court, all of which constituted his duties in his capacity as "clerk of the county clerk." He was made recorder for his county, and was authorized to take the proof and acknowledgment of deeds (and other instruments permitted to be recorded), for record in his county: Hart. Dig., p. 833.

In 1837, it was enacted by a statute, "that the clerks of the several county and district courts of this republic be authorized to appoint a deputy, to whom they shall administer an oath faithfully to discharge the duties of their office, and shall in all cases be responsible for the conduct of their deputies:" Hart. Dig., p. 152.

The business and object of a deputy is to perform the duties of his principal. Taking proof of instruments for record in

his county being one of the duties of the "clerk of the county court," his deputy had authority to perform it.

Judgment reversed and cause remanded for new trial.

WHEELER, C. J. I concur in so much of the opinion as affirms the power of the deputy clerk of the county court to take the acknowledgment or probate of deeds for registration, but not in all the views of the case taken by the majority of the court.

Reversed and remanded.

JURISDICTION OF PROBATE COURT TO PARTITION DECEDENT'S REALTY: *Earl v. Rowe*, 58 Am. Dec. 714; *Sigourney v. Sibley*, 32 Id. 248; sale of land for partition, by commissioners appointed by probate court: *Hutton v. Williams*, 76 Id. 297.

ACTUAL PARTITION BY SALE UNDER JUDGMENT OF PARTITION, UNDER NEW YORK STATUTES: *Mead v. Mitchell*, 72 Am. Dec. 455.

POWER OF DEPUTY CLERK TO TAKE ACKNOWLEDGMENTS OF DEEDS: *Livingston v. Kettelle*, 41 Am. Dec. 169, note.

THE PRINCIPAL CASE IS FOLLOWED as authority that deputy clerk has the right to take acknowledgments and register deeds, in *Cook v. Knott*, 28 Tex. 90; *Frisell v. Johnson*, 30 Id. 35; *Wert v. Schneider*, 64 Id. 330. It is cited as to sufficiency of excuse for reopening administration of estate for purpose of completing a partition, in *Gulford v. Love*, 49 Id. 748.

PEARSON v. BURDITT.

[26 TEXAS, 157.]

WHERE DEFENDANT SHOWS POSSESSION IN HIMSELF OF LAND IN CONTROVERSY for three years prior to the commencement of the suit, holding by a regular chain of title from or under the sovereignty of the soil, it is a good defense, although the jury may believe that fraud in obtaining the deed was sufficiently proved.

DEED FROM ADMINISTRATOR OF LAND OF HIS INTERSTATE, BY HIM SOLD UNDER ORDER OF PROBATE COURT, voidable for fraudulent collusion between the administrator and the purchaser, may be impeached only by a subsequent administrator, or by the heirs or devisees, and is valid to all intents as to all other persons.

LEADING OBJECT OF STATUTE OF LIMITATIONS OF THREE YEARS is to make that period of adverse possession of land mature the inferior title in the hands of the possessor into the superior title.

THESE "INTRINSIC FAIRNESS AND HONESTY," EMBRACED IN DEFINITION OF COLOR OF TITLE IN TEXAS STATUTE, relate to the means of proving the right of property in the land so as to make the title equitably equal to a regular chain.

VERDICT, WHICH FROM WHOLE RECORD APPEARS TO BE RIGHT, will not be disturbed in the appellate court, though it be contrary to the charge of the court below.

APPEAL from Williamson. Suit brought by an administrator *de bonis non* to set aside a deed made by a former administrator, under an order of the probate court to defendant Burditt, which, it was alleged, was made through fraudulent collusion between the administrator and Burditt. Defendant, among other defenses, pleaded the statute of limitations of three years. Enough of the facts are stated in the opinion to render the conclusions announced understood.

W. S. Oldham, and W. L. and Charles L. Robards, for the appellants.

Chandler, Turner, and Scott, and A. J. Hamilton, for the appellees.

By Court, **ROBERTS, J.** This cause was before this court by the name of *Burdett v. Silsbee*, and reported in 15 Tex. 604, where a full statement of the facts will be found, except those which relate to the proof of fraud in Burdett's title.

In the opinion in that case, it was said that "if the plaintiff can prove, as he insists, that there was fraud in the sale, to which the defendant was privy, or of which he is chargeable with notice, then, it is true, his title will not protect him either in his possession or his improvements. But if the sale was fairly made, and the defendant was a *bona fide* purchaser for value, his title will not be affected by the irregularities in the proceedings of the administrator and the probate courts:" *Burdett v. Silsbee*, 15 Tex. 620.

By an amendment, the plaintiff pleaded fraud in the procurement of the deed by defendant Burdett, and defendant pleaded the statute of limitations of three years. A verdict was rendered for defendant.

Defendant does not admit facts which constitute him a fraudulent purchaser, as contended for by the counsel for plaintiff, for he nowhere admits that the land sold for less than its market value at the administrator's sale, or that his purchase in any way prevented other persons from bidding more for the land than he did.

Whatever may be said about the sufficiency of the proof upon the issue of fraud, the defendant showed that he had been in possession of the land for three years before the institution of the suit, holding by a regular chain of title from and under the sovereignty of the soil. And if that is a good defense in this case, he is entitled to the verdict which he ob-

tained, though that might be contrary to the view of the law entertained and announced in the charge of the court.

We think it is a good defense, notwithstanding the jury might have believed that the fraud in Burditt's deed was sufficiently proved. As a mere question of the validity of Burditt's title, it is true, as stated in the opinion above quoted, the plaintiff was in a situation to avoid Burditt's deed for fraud and have it set aside, being the administrator of Silsbee's estate. Had some one else brought suit against Burditt, claiming the land, not under Silsbee, but under a junior patent granted to some one else, then he would not have been in a situation to avoid Burditt's deed for fraud. It was in this point of view that the remark was made in the opinion quoted, that plaintiff could avoid Burditt's deed by showing it to be fraudulent. It was made with reference to the validity of Burditt's title, and not with reference to its capacity to support the defense of the statute of limitations of three years. It simply asserted the principle that Burditt's deed was voidable, and the facts which constituted its voidableness could be shown in this suit so as to have the legal title divested out of Burditt and returned to the heirs or devisees of Silsbee. The administrator having power to sell, and having sold the land, the legal title passed to Burditt, and from the time it was recorded he held under a regular chain of title from and under the sovereignty of the soil. It was a good and valid title against all the world, except the administrator of Silsbee's estate or the heirs or devisees of Silsbee. As to them, it was voidable, not void. As to them, it stood *prima facie* as a good title, until they should institute a suit in some competent court, and show such facts as would establish, not that the legal title had not passed, but that Burditt had fraudulently obtained the legal title to the land, and thereby obtain a judgment of recovery setting aside the deed and reinvesting the title in those thus shown by the adjudication to be equitably entitled to it. The evidence of the true facts relating to such a transaction is as liable to be lost by lapse of time as of those relating to any other, and therefore it is just as reasonable that some limitation should be fixed for the institution of such a suit as any other.

The law has fixed three years, where the purchaser goes into possession, holding under such voidable title: O. & W. Dig., art. 1328. Such a party holds for himself, and not in trust for his vendor, and therefore his possession is adverse. It may be the inferior title, as compared to that which the

vendor can assert; still it is a title until destroyed by the establishment of the superior title.

The leading object and effect of the statute of limitations are to make three years' adverse possession of land mature the inferior title in the hands of the possessor into the superior title: *Porter v. Cocks*, Peck, 31; *Humbert v. Trinity Church*, 24 Wend. 586.

We do not decide this case upon any other principle than those which would govern us were Burditt's only a color of title instead of a title. The terms "intrinsic, fairness, and honesty," embraced in the definition of color of title in our statute, relate to the means of proving the right of property in the land, so as to make the title equitably equal to a regular chain.

Judgment affirmed.

WHO MAY IMPEACH DEED FOR FRAUD IN EXECUTION THEREOF: *Davidson v. Little*, 60 Am. Dec. 81; and see *McCullough v. Wall*, 53 Id. 715.

IMPEACHMENT OF DECEDENT'S DEED BY PERSONAL REPRESENTATIVE, for fraud as to creditors: *Connell v. Chandler*, 62 Am. Dec. 545, 546, note.

WHETHER FRAUD WILL BE ADMITTED AS EXCEPTION TO RUNNING OF STATUTE OF LIMITATIONS, was held to be an open question in the courts of Texas: *Smith v. Fly*, 76 Am. Dec. 109, and note 114.

THE PRINCIPAL CASE IS CITED, on the point as to the object, effect, and construction of the statute of limitations, in reference to title to land, in *Burleson v. Burleson*, 28 Tex. 417; *Erhard v. Hearne*, 47 Id. 480. It is cited to the point that a deed voidable for fraud will support the defense of three years' limitation, in *Downs v. Porter*, 54 Id. 62; *Fry v. Baker*, 59 Id. 405; to the point that where it is sought to impeach a judgment of a domestic court of general jurisdiction, by matter *dehors* the record, and which must be sustained by proof *aliunde*, as in case of alleged fraud of a party, this must be done by some proper affirmative proceeding, and which also, upon grounds of public policy, must be instituted within the time enjoined by law, it is cited in *Murchison v. White*, 54 Id. 83; to the point that the fraud of a party does not render the transaction absolutely void within itself, but simply affords the ground to have it declared void by a proper proceeding for this purpose, it is cited in Id. 85. Even a link in a chain of title subsequent to a patent, which is not void but voidable, will constitute a link in the chain of "title" within the meaning of the statute of limitation of three years; and this even though such voidable deed had its origin in a transaction between the grantor and grantee, which was fraudulent as to an estate represented by the grantor: *League v. Rogan*, 59 Id. 433, citing the principal case.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

O'HEAR v. DE GOESBRIAND.

[23 VERMONT, 502.]

OWNER OF PEW HAS EXCLUSIVE RIGHT TO ITS POSSESSION AND ENJOYMENT, FOR PURPOSES OF PUBLIC WORSHIP, and trespass *quare clausum fregit* lies for a violation of the owner's right of possession.

PAROL EVIDENCE IS ADMISSIBLE TO SHOW that a subscription, expressed in terms to be "for the purpose of building a Catholic chapel," was intended "for the purpose of building a Roman Catholic chapel," to be used as a place of public worship, according to the rites and ceremonies of the Roman Catholic church.

CANON LAW OF ROMAN CATHOLIC CHURCH IS WITHOUT FORCE OR AUTHORITY, AS SUCH, IN VERMONT, and is to be considered in determining the legal rights of parties only so far as it is recognized in or made part of some agreement under which those rights are derived.

QUESTION IS ONE OF FACT, whether the rules of the canon law of the Roman Catholic church, relative to the property in pews, were adopted or recognized by the signers to a subscription for the building of a Catholic chapel.

OCCUPANCY BY ONE TENANT IN COMMON OF PARTICULAR PART OF COMMON PROPERTY, by agreement of the others, is so far a severance in fact as to permit him to maintain trespass against them for the same acts which would constitute trespass in a stranger, even though the length of such occupation would be insufficient to mature an absolute legal title in severalty.

THE opinion states the case.

***B. H. Smalley*, for the defendants.**

***William W. White, H. S. Royce, and L. E. Pelton*, for the plaintiff.**

By Court, KELLOGG, J. This is an action of trespass *quare clausum* with a count in case joined under the statute (Acts of

1856, No. 8), for the destruction by the defendants of a pew in the Roman Catholic chapel or church in Highgate, which the plaintiff claims to have owned as his property.

It appeared from testimony introduced on the trial, which was not controverted, that the building of this church was commenced in the year 1849, and finished in 1851, and that when the building was commenced, the land upon which it was erected was owned by Messrs. S. W. and S. S. Keyes; that from September, 1851, to the time of the alleged trespass by the defendants in tearing up and removing the pew in question, which was on the thirteenth day of May, 1856, the plaintiff was in the exclusive use and occupancy of that pew whenever the church was open for public worship; that on the twenty-fifth of January, 1853, the title and estate of the Messrs. Keyes in the land on which the church was erected was conveyed to the Right Reverend John B. Fitzpatrick, who at that time was the bishop of the Roman Catholic diocese of Boston, of which the state of Vermont formed a part; that in October, 1853, the territory within the limits of the state of Vermont was separated from the diocese of Boston, and erected into a new diocese of the same church, called the diocese of Burlington, of which the defendant De Goesbriand was duly appointed and installed as the bishop, and that upon his installation, he was authorized by Bishop Fitzpatrick to take charge of the church buildings in Highgate, and to control and manage the same as he thought proper. It is not questioned that Bishop De Goesbriand succeeded to and is invested with all the rights connected with this chapel or church which belonged to Bishop Fitzpatrick, and it is admitted that the other two defendants who assisted in tearing up and removing the pew in question acted under his directions.

Pews constitute a subject of peculiar ownership. They are defined to be inclosed seats in churches, and it is said that according to modern use and idea, they were not known till long after the Reformation, and that inclosed pews were not in general use before the middle of the seventeenth century, being for a long time confined to the family of the patron: *Hook's Church Dict.*, tit. Pews. In England, the right of property in a pew is a mere easement or incorporeal right, and hence the English doctrine that case only will lie for the disturbance of the occupant. In *Boothly v. Baily*, Hob. 69, it is held that the church and church-yard are, in law, the soil and freehold of the parson, yet the use of the body of the church, and the

repair and maintenance of it is common to all the parishioners. "And for avoiding of confusion, the distribution and disposing of seats and charges of repair belong to the ordinary," or person having ecclesiastical jurisdiction, "and therefore no man can challenge a peculiar seat without a special reason," as prescribing to repair and maintain it. But in this country, the owner of a pew has an exclusive right to its possession and enjoyment for the purposes of public worship, not as an easement, but by virtue of an individual right of property, derived, in theory at least, from the proprietors of the edifice or freehold, and hence trespass *quare clausum* lies for a violation of the owner's right of possession. It is now well settled in this country that in the absence of any statute provisions, this kind of property is to be considered as real estate in all cases arising under the statute of frauds, or of conveyances, or of descents and distributions: 1 Greenleaf's *Cruise on Real Property*, 44; *Shaw v. Beveridge*, 3 Hill (N. Y.), 26 [38 Am. Dec. 616]; *Jackson v. Rounseville*, 5 Met. 127; *Kellogg v. Dickinson*, 18 Vt. 266; *Hodges v. Green*, 28 Id. 358; *Barnard v. Whipple*, 29 Id. 402; *First Baptist Church v. Bigelow*, 16 Wend. 28; *Vielie v. Osgood*, 8 Barb. 130. "Pews or slips in meeting-houses or places of public worship" are declared to be real estate in this state by statute: Acts of 1853, No. 33. In the case of *Kellogg v. Dickinson*, 18 Vt. 266, it is said by Williams, C. J., that "in this country, a church may be built by a parish, an incorporated society, or by an individual. These several methods were recognized in the case of *Bakersfield Congregational Society v. Baker*, 15 Id. 119 [40 Am. Dec. 668]. The persons who built a meeting-house in either of these ways may retain the fee and maintain an action of trespass for an injury to the yard or buildings, and the right to a seat or to the pews may be in other individuals entirely distinct from them. The interest of the pew-holders is several. They have an exclusive right to occupy a particular seat, to the exclusion of all others, when the house is used for the purpose for which it was erected."

The persons who, by their agreement, efforts, and means, create property of this description, have an unquestionable right to establish its character and incidents, provided that these be such as are not inconsistent with the laws of the state, and the respective rights of the plaintiff and the defendant. De Goesbriand will, therefore, depend upon the agreement entered into between the various parties connected with the

purchase and conveyance of the land upon which the church was erected, and with the building of the church itself.

The original subscription for the building of this chapel, or church, was, by its terms, a subscription "for the purpose of building a Catholic chapel in Highgate village," and the subscription for the purchase of the land for the site is expressed to be "towards the purchase of the two lots of land for the use of chapel." The term "Catholic chapel," used in the first of these subscriptions, has no such precise and definite signification as to exclude extrinsic oral evidence to interpret its meaning, or to point its application to the subject-matter. The courtesies of private society, and of political and religious controversy, accustom us to concede to persons of any communion or party such appellations, by way of distinction, as they choose to assume for themselves; but we should disregard a most palpable reality if we failed to recognize the fact that large bodies of Christians, not in communion with the church of Rome, assert in their creeds and daily worship their right to the name of Catholic, and reject as heretical and schismatical any assumption that the terms "Catholic" and "Roman Catholic" are equivalent, or even allied in signification. The sense in which this term was used and understood by the subscribers when they made their subscriptions "for the purpose of building a Catholic chapel," is therefore properly to be determined by extrinsic oral evidence, and it appears that such evidence was introduced on the trial, without objection, to show that the building of this chapel was an undertaking commenced, carried on, and accomplished by the Roman Catholics in that vicinity, and that after its completion it was always used by that denomination of Christians for public worship, and had always been under the control and supervision of priests of that communion. These facts were not controverted on the trial, and are therefore to be regarded as proved.

This subscription must, therefore, be considered and treated as if it had been expressed to have been made "for the purpose of building a Roman Catholic chapel," to be used as a place of public worship, according to the rites and ceremonies of the Roman Catholic church. It appeared on the trial that the owning or controlling of a pew in a church by a layman is forbidden by the canons or ecclesiastical laws of that church, and that the plaintiff was a layman. But the canon law of the Roman Catholic church, considered in reference to

any intrinsic obligation, has no force or authority in this state. It is a law of the church, and not of the state, and it is not to be considered in determining the legal rights of the parties, except so far as it was recognized in or made a part of the agreement or contract under which those rights are derived. In the elaborate and lucid opinion delivered by Williams, C. J., in *Smith v. Nelson*, 18 Vt. 511 (see pages 549–552), he says that in this state, “we have no religious establishment, no ecclesiastical law or courts established by any authority. All their laws are wanting in this essential requisite to give them any authority, that they are not ‘prescribed by the supreme power in a state.’ And though they may form constitutions, enact canons, laws, or ordinances, establish courts, or make any decisions, decrees, or judgments, yet they can have only a voluntary obedience, [and] cannot effect any civil rights, immunities, or contracts, or alter or dissolve any relations or obligations arising from contracts.”

It is urged, on the part of the defendants, that the object and design of the parties to the original undertaking to build this chapel or church, as expressed in their subscriptions, was to erect a Roman Catholic church; and that the admission of the right of a layman to own and hold a pew therein would prevent its being a Roman Catholic church, even though recognized in the subscription or agreement; and that any agreement for the division of the pews among the subscribers to be owned in severalty, whether contained in the original subscription or agreement, or not, is to be rejected and disregarded as being repugnant to the obvious design and intent of the parties in reference to their proposed undertaking; that the original subscription for the building of the church was a contract in writing that the church to be built by the funds to be raised should be a Roman Catholic church; and that no parol testimony should have been admitted to show that at the time the subscription papers were signed there was a parol agreement made by the parties thereto that the several subscribers (they being laymen) should own the pews in the church, because it would be repugnant to the written contract, inasmuch as the building to be erected could not be a Roman Catholic church if laymen were permitted to own pews in it.

Assuming the purpose expressed in the subscription papers to be that of “building a Roman Catholic chapel,” the natural import of those terms in their popular sense would seem to be that the building to be erected should be used as a house for

the celebration of public worship according to the rites and ceremonies of the Roman Catholic church, and such a use of the building is consistent as well with the claims of the plaintiff as with those of the defendants in this case; for the celebration of public worship cannot be said to be necessarily, if at all, connected with any right of property in the pews. The agreement or intention of the original subscribers to the undertaking is to be carried into effect whenever properly ascertained, but we regard the question whether the rules of the canon law in relation to the property in the pews were adopted or recognized by them when they entered into the original agreement or contract for the building of this chapel, as being one of fact and not of law; and unless those rules were so adopted and recognized by the subscribers, we ought not to interpolate them into the text of the original contract. We do not, therefore, consider that the parol testimony offered by the plaintiff, which was received to show the original verbal agreement in regard to the division and holding of the pews among the subscribers, as claimed by the plaintiff, tended to establish a purpose or arrangement which was inconsistent or at variance with the written agreement; and we think that it was properly left to the jury to ascertain and determine from the evidence, under the charge of the court, what the agreement of the subscribers in respect to rights of property in the pews was, and whether it was contemplated or understood by them, in making the agreement, that those rights were to be subject to and regulated by the canons of the Roman Catholic church, or were to be controlled by their own mutual agreement or contract. The jury, under the charge of the court, found that the original agreement among the subscribers was that they should buy the land and build the church, and that the pews should be divided among the subscribers so that each might own his pew in severalty, and that this agreement was practically carried out and acted upon; that there was a severance and division of the pews agreed to at the time it was made, by all of the subscribers, or made according to the original agreement and subsequently acquiesced in by all the subscribers, so that thereafter, by common consent of the subscribers, the plaintiff, who was one of their number, was recognized and agreed by all of them to have the right to the exclusive occupancy and ownership of the pew in question, and that the plaintiff, from that time forward up to the time of the trespass complained of, did so occupy that pew claiming that right.

And the court charged the jury that the plaintiff could not recover if the agreement among the subscribers was that the land, church, and pews should be under the control of the bishop, and held pursuant to the laws of the Roman Catholic church, and that no layman should hold a pew in the church without the consent of the bishop. The jury, by their verdict for the plaintiff, have negatived the existence of any agreement or understanding of that character among or on the part of the subscribers.

The cases of *Kellogg v. Dickinson*, 18 Vt. 266, *Jackson v. Rounseville*, 5 Met. 127, and *Shaw v. Beveridge*, 3 Hill (N. Y.), 26 [38 Am. Dec. 616], fully adopt the principle that the right of property in pews, when owned by private individuals, is separate and distinct from the title to the fee or feehold of the church itself, and that trespass *quare clausum* lies at the suit of the owner for a violation of his right of possession of the pew, and especially for its actual destruction. In view of the facts thus found by the jury, it would be immaterial, as affecting the plaintiff's right of recovery, whether the original agreement among the subscribers was that the land should be conveyed to the bishop of the diocese, or to the persons who styled themselves the "Catholic Society of Highgate." There is nothing in the case tending to show that the Messrs. Keyes ever treated the original contract made with them, for the purchase of the land on which the church was erected, as being forfeited by reason of a non-compliance with its terms; but on the contrary, they appear to have recognized it as a valid and subsisting contract, which they were willing to execute on their part whenever the price of the land was paid to them. When their title was conveyed to Bishop Fitzpatrick, in January, 1853, they had received the full price of the land according to the terms of the original contract, and a part of the payment for the land had been made to them by the plaintiff on behalf of the subscribers for that object; and the plaintiff then held the pew in question in actual possession in severalty, under a division of the pews in fact, previously made by the agreement or acquiescence of all who were then interested in the property. After the land was paid for, the Messrs. Keyes should be regarded as holding the legal estate or freehold of the land and the church for the benefit of the persons who purchased the land and erected the church; and for a forcible injury to the possession of any pew then owned in severalty, the pew-owner could have sustained trespass even

as against them; and it is quite obvious that Bishop Fitzpatrick, who paid nothing towards the price of the land or the expenses of building the church, or as a consideration for the conveyance to him, could stand, as their grantee, in no right or position in regard to those who were then the owners of the pews in the church, superior to that in which the Messrs. Keyes themselves stood at the time of making their conveyance to him.

It is urged on the part of the defendants, that the right to pews is real estate, and can only be divided among tenants in common by a conveyance in writing, or by fifteen years' possession under a parol partition; that five years' possession alone will not make a legal severance of the tenancy in common; that if the plaintiff had any right to the pew in question, it was the right of a tenant in common with two of the defendants, Twombly and Minard, who contributed to the fund to buy the land and build the church; and that an action of trespass *vi et armis* or *quare clausum* will not lie in favor of one tenant in common against his co-tenant. Where the grantees of a township made a division of it in fact among themselves, and the division was acquiesced in for a period of fifteen years, it has been recognized as a valid division in law, however informal it might have been, and although not made in conformity with the requisitions of the statute: *Booth v. Adams*, 11 Vt. 156 [34 Am. Dec. 680]. Such a division ripens by possession under it for fifteen years into an absolute legal title in severalty. It is true that one tenant in common cannot bring an action of trespass against another for entry upon and enjoyment of the common property; but when one tenant in common occupies a particular part of the common property by the agreement of the other tenants in common, it is regarded as being so far a severance in fact as to permit him to maintain trespass against them for the same acts which would constitute trespass in a stranger, even though the length of such occupation would be insufficient to mature an absolute legal title in severalty. This principle was settled in the case of *Keay v. Goodwin*, 16 Mass. 1, and is recognized in the case of *Booth v. Adams*, 11 Vt. 158 [34 Am. Dec. 680]; and in 4 Kent's Com. 370, it is said that if one tenant in common "occupies a particular part of the premises by agreement, and his co-tenant disturb him in his occupation, he becomes a trespasser." See also the case of *Johnson v. Goodwin*, 27 Vt. 288.

These principles dispose of all the points made on the argument of this case. The case of *Smith v. Bonhoof*, 2 Mich. 115, was cited in the argument on the part of the defendants as an authority for the proposition that a church could not be a Roman Catholic church in which a layman was permitted to own a pew, inasmuch as it would be in violation of one of the fundamental laws of the church. The facts on which the controversy in that case arose were, in substance, as follows: One Beaubien conveyed a piece of ground to Lefevre, bishop of the Roman Catholic diocese of Detroit, and his successors in office in trust, for the erection of a church thereon, to be used as a place of public worship, and for the spiritual use, benefit, and behoof of the German Roman Catholic church congregation in the city of Detroit, according to the rites and ceremonies of the Roman Catholic church, and for other trusts therein expressed. The deed also provided that in the event of a vacancy in the office of bishop, happening between the death of Bishop Lefevre and the appointment of his successor, the premises should vest during such vacancy in the archbishop of the Roman Catholic church, of which the diocese should be a suffragan. Trustees of the church were afterwards elected by the congregation organized as a corporation under the statute law of the state. The priest officiating in the church under the bishop leased a pew in it to the defendant, Bonhoof, who went into the possession of it, and the trustees rented the same pew to Smith, the plaintiff. The question in the suit was whether the officiating priest, or the trustees, had the right to control and rent the pews; and the claim of each party was referred exclusively to the right to the control of the church edifice, and not to any private right of property in the pews distinct from and independent of that right, like that claimed by the plaintiff in this case. It was held that under the deed of trust, and the constitution, laws, and usages of the Roman Catholic church, by which the administration of the temporalities of the church is vested in the parish priest, the right to rent the pews belonged to the priest, and not to the trustees.

In the opinion of the court, delivered by Chief Justice Whipple, in that case, he says: "If I am to believe the testimony of witnesses, it is clear that when the control of the church edifice is wrested from the clergy and placed in the hands of laymen, it ceases from that moment to be a Roman Catholic church." But he does not intimate that a church in which a

layman was allowed to own a pew could not be considered as a Roman Catholic church, and the case did not involve the decision of any such question. In view of the fact stated in the very able and elaborate argument for the defendants in this case, that by the provisions of the canon law leases of pews in a church, whether in writing or by parol, cannot exceed three years in duration, that case furnishes a suggestive commentary upon a proposition of that character, as well as upon the alleged universality of the application of the rules of the canon law in respect to property in pews, in the fact which appears in the report of the case, that in the fourth condition of the deed of trust from Beaubien to Bishop Lefevre, it was provided that as soon as the church to be erected on the land should be completed, Beaubien, the grantor, and his wife might select and choose a pew in the church, and have and hold the same during each of their natural lives, free and clear of all expense, payment, assessments, and charge whatsoever. Our conclusions in this case result from the application of the principle that the original agreement of the subscribers or donors who, by the union of their efforts and contributions, created the property in this church and its pews, is to be carried into effect when properly ascertained; and this principle is fully recognized in the case of *Smith v. Bonhoof*, 2 Mich. 115.

We regard this case as having been properly submitted to the jury, under well-considered and appropriate instructions from the court; and finding no error in those instructions, or in the refusal to instruct the jury as requested by the defendants, or in the admission of the parol evidence offered by the plaintiff to show the original verbal agreement in regard to the division and holding of the pews among the subscribers as claimed by him, the judgment of the county court is affirmed.

NATURE OF PROPERTY IN PEWS GENERALLY, and remedy of a pew-owner for a disturbance in his possession: See *Shaw v. Beveridge*, 38 Am. Dec. 616, and note; *Daniel v. Wood*, 11 Id. 151; *Grant v. Chase*, 9 Id. 161; *Barnard v. Whipple*, 70 Id. 422.

THE PRINCIPAL CASE IS CITED in *Howe v. Stevens*, 47 Vt. 272, to the point that a pew-holder can maintain trespass even against the society itself, or any one standing upon its right, for an exclusion of himself from his pew, unless done in the exercise of the right to repair or rebuild belonging to the society to which his ownership was subject.

NATURE OF PEW-HOLDER'S TITLE.—The word "pew" is said to be derived from "puye," and to signify a seat inclosed in a church: *Brumfitt v. Roberts*, L. R. 5 C. P. 224, 232. In England, no separate seats were allowed in the church, except in a few instances, prior to the Reformation, and the body of

the church was common to all the parishioners. But after the Reformation, the ordinary or bishop granted the right to particular seats to individual parishioners, and this grant was called a "faculty:" See Burns Ecc. L., tit. Church, c. 7; Hook's Church Diet., tit. Pews; *Presbyterian Church v. Andrus*, 21 N. J. L. 329, note. And the right to a pew in a church, in England, can only exist by faculty or by prescription: *Morgan v. Curtis*, 3 Mee. & R. 389; and in an action for disturbance in the enjoyment of the right, the plaintiff must prove a prescriptive right, or a faculty, and should claim it in his declaration as appurtenant to a messuage in the parish: *Mainwaring v. Giles*, 5 Barn. & Ald. 356; *Stocks v. Booth*, 1 T. R. 430; *Brumfitt v. Roberts*, L. R. 5 C. P. 232; for the grant of a pew in England to any person, without regard to a messuage or inhabitancy within the parish, is void by the general law: *Id.*; *Ridout v. Harris*, 17 U. C. C. P. 88, 97. Non-parishioners have no right to a pew or a sitting, except by prescription: *Byerley v. Windus*, 7 Dowl. & Ry. 564; S. C., 5 Barn. & Cress. 1. Every parishioner has, however, a right to be seated, though not to a pew: *In re Cathedral Church*, 8 L. T., N. S., 861. The interest which a pew-holder has in his pew is held by the English cases to be of an incorporeal nature only. It is in the nature of an easement, a right or privilege in the lands of another; and the holder of a pew or seat is not deemed the owner of so much of the site of a church as is comprised within the area of such pew or seat: *Mainwaring v. Giles*, 5 Barn. & Ald. 356; *Gully v. Bishop of Exeter*, 4 Bing. 294; *Brumfitt v. Roberts*, L. R. 5 C. P. 232. It appears to be the right to enter and occupy the pew during the celebration of divine service, and not the right to be there at all times, or any other time than when the church is open for church purposes: *Id.*; *Ridout v. Harris*, 17 U. C. C. P. 88. That a corporation may hold a pew, see *Regina v. Mayor etc.*, 8 Q. B. 926; S. C., 10 Jur. 962.

In this country, pews are said to be held by very peculiar titles. But generally, in the absence of a statute declaring them real or personal property, pews are to be considered as partaking of the nature of realty, as held in the principal case, and the cases there cited: See also *Howe v. Stevens*, 47 Vt. 272; *St. Paul's Church v. Ford*, 34 Barb. 16; *Solier v. Trinity Church*, 109 Mass. 1; *Brumfield v. Carson*, 33 Ind. 94; S. C., 5 Am. Rep. 184. The freehold of the church is in the corporation, or in the trustees, for the use of the congregation; and the practice prevails of leasing or selling to individuals an exclusive right to a particular pew. The right thus acquired is a legal right, and when vested in the owner, and in his heirs, it is held to be real estate, not personal: *Presbyterian Church v. Andrus*, 21 N. J. L. 325. It is, however, held in Pennsylvania that although the exclusive right to a particular pew is a sort of interest in real estate, yet as property it is so conditional and impermanent that it cannot be called real estate, and must necessarily pass to the personal representative: *Church v. Wells*, 24 Pa. St. 249. In Louisiana, a pew in a church must be classed as an incorporeal immovable: *Succession of Gamble*, 23 La. Ann. 9. It is held in New York that the interest in a pew is separate from the fee, and may be leased and held distinct from the fee: *Woodworth v. Payne*, 74 N. Y. 196, S. C., 30 Am. Rep. 298, citing *Shaw v. Beveridge*, 3 Hill (N. Y.), 26; *First Baptist Church v. Bigelow*, 16 Wend. 28. The right to a pew can be transferred only in the manner provided for the transfer of realty: *Barnard v. Whipple*, 29 Vt. 401; S. C., 70 Am. Dec. 422.

But while the right of the pew-holder in this country is generally regarded as in the nature of an interest in real estate, yet his interest is both qualified and limited. The grant of a pew in a church edifice in perpetuity does not give to the pew-owner an absolute right of property, as in a grant of land in

fee, but a limited usufructuary right only: *Kincaid's Appeal*, 66 Pa. St. 411; *Craig v. First Presbyterian Church*, 88 Id. 42, 51; *White v. Trustees etc.*, 3 Lana. 477, 484. It is in reality a mere easement, a privilege or use in the freehold of another: *First Baptist Soc. v. Grant*, 59 Me. 245; *Union House v. Rowell*, 68 Id. 400; *Presbyterian Church v. Andruss*, 21 N. J. L. 325. The pew-holder owns neither the soil beneath nor the space above the pew; nor has he any such ownership of the pew itself as authorizes him to alter or convert it to any other use: *Id.*; *Gay v. Baker*, 17 Mass. 435; S. C., 9 Am. Dec. 159.

RIGHTS OF PEW-HOLDERS.—Generally speaking, a pew-holder, as between himself and the owners of the church edifice, has only the right to occupy the pew during divine service, and in the mode prescribed or agreed upon at the time of the purchase: *Brumfitt v. Roberts*, L. R. 5 C. P. 232; *First Baptist Soc. v. Grant*, 59 Me. 245; *Craig v. First Presbyterian Church*, 88 Pa. St. 51; *Erwin v. Hurd*, 13 Abb. N. C. 91; *Presbyterian Church v. Andruss*, 21 N. J. L. 325. It is a right to occupy the pew purchased so long as it remains, or to the limit of the term of the purchase, subordinate to the power of the church corporation to make necessary changes and repairs, or to sell the church edifice and remove elsewhere: *Abernethy v. Society etc.*, 3 Daly, 1, 7; *Erwin v. Hurd*, 13 Abb. N. C. 91; *Solomon v. Congregation etc.*, 49 How. Pr. 263; *Van Houten v. First Ref. Dutch Church*, 17 N. J. Eq. 126; *Solier v. Trinity Church*, 109 Mass. 1, 21; *Howe v. Stevens*, 47 Vt. 262; and see *Hinde v. Charlton*, L. R. 2 C. P. 104; *Greenway v. Hockin*, 5 Id. 235. When changes and repairs are necessary, and the pew is removed, the title is gone, leaving the pew-holder without remedy: *Voorhees v. Presbyterian Church*, 17 Barb. 103; *White v. Trustees etc.*, 3 Lana. 477.

In England, the only remedy for an interruption of the right of property in a pew is an action on the case for a disturbance, as in other cases of injury to incorporeal hereditaments: *Mainwaring v. Giles*, 5 Barn. & Ald. 356; and this action cannot be maintained unless the right be claimed as appurtenant to a messuage in the parish, and be so averred in the declaration: *Id.*; *Bryan v. Whistler*, 8 Barn. & Cress. 294; S. C., 2 Moo. & R. 332; *Brumfitt v. Roberts*, L. R. 5 C. P. 232. Trespass will not lie for entering into a pew: *Stocks v. Booth*, 1 T. R. 430; nor is ejectment maintainable: *Ridout v. Harris*, 17 U. C. C. P. 88.

But in this country, a pew-owner may maintain trespass *quare clausum fregit*, or resort to his remedy by writ of entry and ejectment, for an ouster or disturbance of his rights of possession: *Gay v. Baker*, 17 Mass. 435; S. C., 9 Am. Dec. 159; *Jackson v. Grindell*, 5 Met. 127; *Howe v. Stevens*, 47 Vt. 262, 272, citing the principal case; *Woodworth v. Payne*, 74 N. Y. 196; S. C., 30 Am. Rep. 298; or trespass on the case is held to be the appropriate remedy for a mere disturbance in the enjoyment of the right to a pew, not amounting to its destruction: *Perrin v. Granger*, 33 Vt. 101. A pew-owner may maintain trespass for the first invasion of his individual right to his pew, after others have so far obtained possession of the church edifice as to oust the society: *Howe v. Stevens*, 47 Id. 262; but not for the mere breaking and entry of the building in which his pew is fixed: *Id.* If a church edifice is in such ruinous condition that it cannot be and is not occupied for public worship, and its entire demolition is necessary, a pew-owner can recover only nominal damages for injury to his pew: *Id.*; *Gorton v. Hadsell*, 9 Cush. 508. And trustees will not be enjoined, at suit of a pew-owner, from pulling down and rebuilding an old church which has become dilapidated: *Heeney v. St. Peter's Church*, 2 Edw. Ch. 608. If neither claimant to a pew has any legal title thereto, the one in possession will not be disturbed: *Montgomery v. Johnson*,

9 How. Pr. 232; and being in possession, although without title, he is justified in defending the possession by force against the entry of any person having no title: *Brett v. Mullarkey*, 7 Ir. R. C. P. 120.

It was held in New York that a Roman Catholic priest having charge of a parish and acting as the representative of his bishop, in whom is vested the legal title to the church property, has the right to regulate assessments upon and the occupancy of pews, and is justified in ejecting from the church edifice, not using excessive force, any parishioner who refuses to comply with the regulations: *Crowley v. Miller*, 19 N. Y. Week. Dig. 262 (Supr. Ct).

McMAHAN v. GREEN.

[34 VERMONT, 69.]

OFFICER IS BOUND TO ASSIST KNOWN PUBLIC OFFICER IN MAKING ARREST,
when called upon to do so, and need not inquire into the regularity or
legality of the process in the officer's hands.

TRESPASS for assault and battery and false imprisonment.
The facts are stated in the opinion.

Thrall, for the plaintiff.

Everts, for the defendant.

By Court, ALDIS, J. The plaintiff was arrested by William Edgerton, a deputy sheriff, upon a warrant issued against John McManus for an assault with intent to commit rape. The defendant was required by the officer to assist him in making the arrest, and in obedience to such command he accompanied the officer in making the arrest and in committing the plaintiff to prison. The plaintiff's name is John McMahan instead of John McManus, and upon this ground he claims that the warrant was void against him, and that the defendant is liable to an action of trespass and false imprisonment in thus assisting the officer.

When a warrant or other process is regular on its face, it protects the officer who does what it enjoins. He is not required to investigate the proceedings anterior to the warrant to see that they are regular and valid.

But in civil cases, where there is misnomer in mesne process, which has not been waived, though it be executed upon the person against whom it was intended, the officer will be liable in trespass. Thus in *Shadgett v. Clipson*, 8 East, 828, where Josiah Shadgett was arrested upon process against him by the name of John, the officer was held liable in an action for false imprisonment. The court said process ought to de-

scribe the party against whom it is meant to be issued; and the arrest of one person cannot be justified under a writ sued out against another: See also *Wilks v. Lorck*, 2 Taunt. 400; *Cole v. Hindson*, 6 T. R. 234; and *Morgans v. Bridges*, 1 Barn. & Ald. 647; 1 Chit. Pl. 213; *Mead v. Haws*, 7 Cow. 332. But when the party so misnamed in the writ omits to plead it in abatement, and suffers judgment to pass against him, it is a waiver of the defect, and the judgment is valid against him: *Smith v. Bowker*, 1 Mass. 76.

In *Griswold v. Sedgwick*, 6 Cow. 456, process was issued from a court of equity to attach for contempt Samuel S. Griswold, and was served upon Daniel S. Griswold, the person really in contempt, and against whom the order was made. As soon as the officer discovered the mistake in the attachment, the prisoner was discharged. He thereupon brought trespass for false imprisonment against the officer, and it was held he was liable.

No case has fallen under our notice where the same rule has been applied to process in strictly criminal cases. There seem to be some reasons why it should not be so applied. The facility with which criminals pass from one part of the country to another, where they are wholly unknown, the various names by which they pass, and the difficulty of ascertaining their true names, especially of foreigners, French and German, whose names would be likely to be misunderstood and misspelled, and the importance of promptly arresting them, and to that end, of protecting officers in so doing, would seem to furnish some reasonable grounds for adjudging that when the person who is really meant is arrested, though by a wrong name, such slight error, so harmless and so easily rectified, ought not to subject the officer to a suit. Should such an exception be sustained, it could only be probably where the name was unknown, or concealed, or falsely given, and the true party, against whom the process was issued, had been arrested. In such case, perhaps, the mythical John Doe, who appears here in the complaint, might properly be held to represent the true name of the respondent. But it is not necessary to settle that point, as there is another which is decisive of this case.

Sheriffs and other officers are by statute empowered to require suitable aid in the execution of their office in apprehending criminals: Comp. Stats., c. 13, sec. 11. When the defendant was called upon by the sheriff in this case to assist

him in arresting the plaintiff, he was not at liberty to refuse. Nor could he demand of the sheriff an inspection of the warrant under which he was acting, in order to see by what authority he was proceeding, and whether, in his judgment, it would be safe to assist him. It was enough that he was the sheriff (or deputy sheriff), a known public officer, who called on him for aid in the execution of his office; it was his duty to yield immediate obedience to the demand. The nature of the case requires that there should be no delay in rendering the requisite assistance; no nice inquiries into the written authority of the sheriff to do what he is doing. It is sufficient that the officer asks for aid in a matter in which he has by law a right to ask for aid, and that he is a known public officer. The person who is thus called on is protected by the call from being sued for rendering the requisite assistance. If the officer has no warrant or authority that will justify him, he may be liable as a trespasser; but the person who is called upon for aid, having no means of knowing what the warrant is by which the officer acts, and who relies upon the official character and call of the sheriff as his security for doing what is required, is clearly entitled to protection against suits by the person arrested. The necessity of the case forbids that he should have the means of knowing, or the time to inquire into, the anterior proceedings. Nor does the law intend that any such inquiry should be tolerated, or that men called upon to aid officers in arresting criminals shall stop to examine papers, and to take counsel as to the legality of the process under which the officers act. This statutory right of an officer to call for aid is but an affirmance of the common law: Bac. Abr., tit. Sheriff, N, 2.

So, too, it is held at common law that those who obey the command of the sheriff in arresting criminals will be thereby justified, though the sheriff be acting without authority: Hamm. N. P. 63-65.

In *Hooker v. Smith*, 19 Vt. 151 [47 Am. Dec. 679], this doctrine is expressly recognized by Judge Hall, although it was not the point decided in the case. The doctrine stands upon the ground upon which sheriffs are protected in the execution of a precept regular on its face, though the prior proceedings may be invalid, viz., that they are not expected to know, and have no means of knowing, what the previous proceedings were, and that in order to have the laws promptly executed, officers must execute process legal on its face without further

inquiry. The policy of the law and justice to the defendant alike demand that his justification of the alleged trespass and imprisonment, viz., obedience to the official demand of the sheriff for his aid in arresting the plaintiff for crime, should be sustained.

In civil cases merely, the sheriff, having no authority to call for such aid, when there is no breach of the peace or other criminal offense, the persons who interfere and aid the officers are said to be liable: Archbold's Practice, 853.

But that would not affect this case, as it was for the arrest of a criminal. On this subject, see also *Brunskill v. Robertson*, 9 Ad. & El. 840, 846; *Morgans v. Bridges*, 1 Barn. & Ald. 652; *Reeves v. Slater*, 7 Barn. & Cress. 486; *Finch v. Cocken*, 3 Dowl. 678.

Judgment affirmed.

PRIVATE PERSON IS BOUND TO ASSIST KNOWN PUBLIC OFFICER IN MAKING ARREST: Note to *Hawkins v. Commonwealth*, 61 Am. Dec. 154; and the officer's command will be a justification: Id.; compare *Emery v. Hapgood*, 66 Id. 459.

WARRANT, WHEN PROTECTS OFFICER: See *Clarke v. May*, 61 Am. Dec. 470, and note referring to prior cases; *Fisher v. McGirr*, Id. 381; *Barber v. Stetson*, 66 Id. 457; *Emery v. Hapgood*, Id. 459; *Slomer v. People*, 76 Id. 786.

JORDON v. DYER.

[34 VERMONT, 104.]

CONTRACT CONTAINS AS PART OR CONDITION WHATEVER IS EXPECTED BY ONE PARTY, and known to be so expected by the other.

ASSUMPSIT. The report of the referee, to whom the cause was referred by the county court, showed that the defendant wished to purchase the farm of the plaintiff, Mrs. Jordon, and that she was willing to sell it for one thousand two hundred dollars, provided she and her husband could obtain another farm which would suit them. The defendant informed the plaintiffs that one Rufus Goss had such a farm, which he would sell for one thousand two hundred dollars. The plaintiffs, after examination, agreed to sell their farm to the defendant for one thousand two hundred dollars, and to take the Goss farm at the same sum, if the defendant, who conducted the negotiations, could not induce Goss to take less. The defendant bought the Goss farm for one thousand and fifty dollars, and took a deed to Mrs. Jordon to be returned to

Goss, if the bargain with Mrs. Jordon and her husband should not be consummated. The plaintiffs were willing to take the Goss farm at one thousand two hundred dollars, if it could not be bought for less. The defendant asserted that that sum was the least Goss would take, whereupon the plaintiffs executed a deed to the defendant, and the defendant delivered the deed from Goss. Mrs. Jordon declared at the time that she was not "swapping," but buying and selling. The plaintiffs would not have completed the transaction without the payment of one hundred and fifty dollars more, if it had not been for the defendant's false representations. Judgment was to be for the plaintiffs for one hundred and ninety dollars and costs, if the court should be of the opinion that they were entitled to recover; otherwise the defendant was to recover his costs. The court gave the plaintiffs judgment, and the defendant excepted.

Linsley and Prout, for the plaintiffs.

Briggs and Nicholson, for the defendant.

By Court, KELLOGG. J. This is an action of *assumpsit* for the recovery of the price of certain real estate alleged to have been sold by the plaintiffs to the defendant, and the facts relied on to support the action appear in the report of the referee to whom the cause was referred in the county court. The plaintiff's claim depends on the question whether the real character of the transaction between them and the defendant was that of a sale of the farm of Mrs. Jordon, one of the plaintiffs, to him for a certain and specified price, or that of an exchange of this farm with him for the Goss farm, without reference to any agreed price either for the one or the other, like the case of the exchange of articles of property when treated by the agreement of the parties as being equal in value.

We regard it as a rule of law, no less than of morals, that whatever is expected by one party to a contract, and known to be so expected by the other, is to be deemed a part or condition of the contract. Applying this rule to the facts reported by the referee, we think that this transaction should be regarded, not as an exchange of farms, but as a sale by the plaintiffs of their farm to the defendant, and that the defendant, by his conduct and representations, intentionally led the plaintiffs to act on the basis of his acceptance of their proposal to sell their farm to him for the specified price of twelve hundred dollars, and to take the Goss farm in payment at the

same sum, if the defendant could not induce Goss to take a less sum for his farm. The proposal implied that if the defendant bought the farm of Goss for a less sum, the plaintiffs were to take it in payment for their farm only at the price for which the defendant might purchase it of Goss. The defendant, having purchased the farm of Goss for one hundred and fifty dollars less than the price for which he knew the plaintiffs were selling their farm to him, and having obtained a conveyance from the plaintiffs, not merely by concealing that fact from them when it was his duty to disclose the truth in regard to it, but also by falsely representing to them that he paid to Goss the same sum for which they had proposed to sell their farm to him, should, on the facts reported by the referee, be treated as having to that extent "kept back a part of the price" of the plaintiffs' farm; and the plaintiffs are entitled to recover it in this action.

The judgment of the county court in favor of the plaintiffs on the report of the referee is affirmed.

THE PRINCIPAL CASE IS REFERRED TO in *Grover & Baker S. M. Co. v. Bulley*, 48 Ill. 193, on the point that whatever is expected by one party, and known to be so expected by the other, is to be deemed a part or condition of the contract.

COOK v. CARPENTER.

[34 VERMONT, 121.]

PARTNERSHIP RELATION EXISTS, ALTHOUGH CONDITIONS OF PARTNERSHIP ARE NOT UNDERSTOOD ALIKE BY PARTNERS, when persons agree to become partners, and actually proceed to carry into execution the joint undertaking or business.

REFEREE IS NOT BOUND BY PARTICULAR DECLARATION AND PLEADINGS, but may award upon the subject-matter of the action without regard to them, when parties agree to a reference of a pending action, under a rule of court, so that the court is to render a judgment on the report; even where it is a part of the submission or rules of reference, that the referee is to be governed by the rules of the law.

POWER OF REFEREE, UNDER RULE OF COURT, EXTENDS TO WHAT PARTIES AGREED TO SUBMIT, and no more; and if he undertakes to try and award upon other matters not submitted, the award is invalid.

ASSUMPSIT to recover the amount the plaintiff was compelled to pay upon a note signed by the defendants and himself. The case was referred, under a rule of court, by agreement of the parties; and by the terms of the reference the referees were to be governed by the rules of the law. The report showed that

the plaintiff, Theodore Cook, and the defendant, Hiram Cook, were partners in the business of buying and selling hogs and cattle for the Boston market. Hiram Cook proposed to the plaintiff that they should take in the defendant Carpenter as a partner. The plaintiff replied that he was willing to do so, if Hiram Cook and Carpenter would furnish money to buy the stock, and would buy and deliver the same at the Cambridge market; that he, on his part, would sell such stock and guarantee the sales; and that the expenses, profits, and losses should be divided equally among the three. Hiram Cook then represented to Carpenter that the plaintiff was willing to take him in as a partner; that Hiram Cook and Carpenter were to buy the stock and deliver it, and that the plaintiff should sell it; that the money was to be obtained on the joint note of the three; and that the expenses, profits, and losses were to be shared equally among the three; but nothing was said to the effect that Carpenter and Hiram Cook were to furnish the money for the business, nor that the plaintiff was to guarantee the sales. Carpenter consented to go into the business on the terms proposed by Hiram Cook. The plaintiff and Carpenter did not, of themselves, have any understanding in regard to the conditions of the partnership agreement. The plaintiff supposed that the defendants were to furnish the money, and that he was to guarantee the sales, while Carpenter supposed the money was to be furnished equally by the three. Hiram Cook afterwards told the plaintiff that he and Carpenter wanted to use the plaintiff's name to obtain money for the business from some bank, and the plaintiff consented that his name might be signed by Hiram Cook to a joint note of the three. The note was discounted by a bank, and the money employed in the business. The business resulted in a loss, and the plaintiff was obliged to pay much the largest part of the note. The referees reported the dealings and accounts of the partners in detail, and found a balance due the plaintiff from the defendants. It was also reported that the parties did not agree that the accounts of the partnership should be adjusted. Judgment was rendered on the report for the defendants, and the plaintiff excepted.

D. E. Nicholson, and Linsley and Prout, for the plaintiff.

E. J. Phelps, for the defendants.

By Court, POLAND, C. J. The plaintiff in this action of *general assumpsit* claims to recover the amount he was com-

pelled to pay upon the note given to the bank, signed by himself and the other two defendants, upon the ground that the other defendants were the principals, and he their surety. The defendant Carpenter claims that the plaintiff and defendants were partners, and that this note was given to raise funds to carry on the partnership business; that the signers all stood as principals on the note, and that the matter can be adjusted properly only by some proceeding proper to settle the whole partnership concern, and that this action is inadequate and inappropriate to that end. The plaintiff insists that there was no partnership, that as there was a total misunderstanding between him and the defendant Carpenter, as to the basis or articles of the partnership, no partnership existed; and many authorities are cited to show that to constitute a partnership, there must be an agreement, a meeting of the minds of the parties, and that a man cannot be made a member of a partnership without his consent. The soundness of this principle cannot be doubted; the difficulty is, it does not apply to the case. The plaintiff and the defendant Carpenter did both agree to be partners, and both understood they were acting as partners; and actually proceeded to carry on the joint enterprise, with the understanding that they were to share in the profits or losses of the transaction; but by the default of the defendant Cook, they did not understand the terms of the joint agreement alike. The plaintiff understood that the capital was to be raised wholly by the defendants, while the defendant Carpenter understood it was to be raised in the ordinary way, by all the members of the firm. It has never been held that when persons agree to become partners, and actually proceed to carry into execution the joint undertaking or business, that the relation of partners does not exist, because the conditions of the partnership are not understood alike by the partners. It is conceded that the note to the bank was given to raise the funds to carry on the joint business, but the same differing ideas of the partnership relation still existed, and while the plaintiff supposed that he was signing the note as a surety for the others, the defendant Carpenter supposed all were equally bound as principals. From the facts reported by the referees, neither the plaintiff nor Carpenter seemed to have been at all in fault in understanding the terms of their connection as they did; the whole blame rested on the defendant Cook, who acted as the medium between them in making the arrangement. We see no ground on which the plaintiff can

claim that the defendant Carpenter shall be bound by the contract as the plaintiff understood it, with any better reason than Carpenter can claim that the plaintiff shall be bound by Carpenter's understanding of it. In this dilemma, both parties being without fault, we think the matter must stand for settlement between them upon the general principles of partnership, that the gains or losses be shared by the respective partners.

In this case, it seems that, so far as the plaintiff and Carpenter are concerned, there has been a loss, and the referees have reported the amount of their respective losses.

The plaintiff admits that his action is not the proper one in which to adjust the partnership dealings, but he claims that as the action was referred by agreement of parties, and they have reported in such a manner that the court can render a judgment upon the basis of a partnership adjustment, the form of the action should be disregarded, and such a judgment be rendered; and it is claimed that the decisions of this court in relation to the effect of referring cases to referees have gone to this extent.

The cases on this subject are very numerous in our reports, and the language of the different judges not very uniform as to the precise rule on the subject.

The general doctrine to be extracted from all the cases seems to be this: that where parties agree to an arbitration or reference of a pending action, under a rule of court, so that the court are to render a judgment on the report or award, even where it is a part of the submission or rule of reference, that the arbitrator or referee is to be governed by the rules of law, it is the cause of action which forms the basis of the submission, and not the particular form of the declaration which the party has adopted, or any particular issue which may have been formed upon it, and that therefore the referee is not bound by the particular declaration and pleadings, but may award upon the subject-matter of the suit without regard to them. An arbitration or reference, under a rule of court, stands upon the same general principle as do all arbitrations—the mere agreement of the parties; and the power of the arbitrator or referee extends to just what the parties have agreed to submit, and no more; and if he undertakes to try and award of other matters not submitted, the award is invalid. It is conceded that the only matter for which the plaintiff brought his suit was the money he paid on the note

to the bank, and not to recover any general partnership balance that might be due to him, and his declaration could not have been amended so as to have enabled him to do so, for it would not only have required an entire change of the form of the action, but to introduce a new cause of action, which the court have no power to allow.

The cause of action then, which formed the basis, and the extent of the submission, was the money paid on this note; this was what the plaintiff claimed to recover before the referees, and what he claims now.

Nor can it be claimed that the submission was extended by consent before the referees, for they state in their report that neither party claimed to go into a settlement of the partnership matters before them, or assented to their doing so.

Their report, then, so far as it furnishes a basis for a judgment for the partnership balance, was upon matters not embraced in the submission, and we cannot therefore properly render judgment upon it.

As the note was given for money that went into the partnership, and the plaintiff is not entitled to claim that he stood merely as a surety upon it for the defendants, we think it can be settled only in some proper action brought to close the whole partnership affair. We have sought earnestly to find some ground on which we could justify a judgment for what appears to be the partnership balance due to the plaintiff, as that appears to us to be where the matter must at last stand between them, but we feel that it cannot be done without violating settled principles.

The judgment is affirmed.

PARTNERSHIP, HOW CONSTITUTED INTER SE: See *Ellsworth v. Tarr*, 62 Am. Dec. 749; *Bromley v. Elliott*, 75 Id. 182; *Macy v. Combs*, 77 Id. 103, and prior cases in the notes thereto.

ARBITRATORS ARE NOT BOUND TO FOLLOW STRICT RULES OF LAW: *Rencles v. Hall*, 76 Am. Dec. 140.

ARBITRATORS CAN AWARD ONLY UPON MATTERS SUBMITTED: *Stewart v. Cass*, 42 Am. Dec. 534; *Whitfield v. Whitfield*, 47 Id. 350.

GRAHAM v. STEVENS.

[34 VERMONT, 161.]

TRANSACTION IS MORTGAGE where a deed is made of certain premises, but the grantor remains in possession, and prior to the execution and delivery of the deed the grantee indorses upon its back an agreement to reconvey, at the expiration of a specified time, in payment of a sum of money, nearly equal to the consideration of the deed, and less than the value of the premises, together with a sum for the use of the premises.

INSTRUMENT MAY BE REGARDED AS MORTGAGE, ALTHOUGH NO OTHER WRITTEN EVIDENCE OF DEBT EXISTS than that furnished by the instrument itself.

EJECTMENT. The defendant and his wife executed a deed of the premises in question to the plaintiff, in consideration of eight hundred and fifty dollars. Prior to its execution and delivery, the plaintiff indorsed on the back of the deed an agreement to the effect "that if the said H. B. Stevens, or his heirs or assigns, or executors or administrators, or any of them, within five years from this date, cause to be paid or pay the above-named A. P. Graham, his heirs, executors, administrators, or assigns, the full sum of eight hundred and fifty-one dollars, good and lawful money of the United States, together with the use of said farm, then the above-named A. P. Graham shall make and execute to the above-named H. B. Stevens a good and sufficient deed of the within-named farm." The value of the premises was one thousand dollars. The defendant continued to remain in possession. The plaintiff had judgment, and the defendant excepted.

Butler and Wheeler, for the plaintiff.

A. L. Miner and H. E. Miner, for the defendant.

By Court, **PIERPOINT, J.** The determination of this case depends upon the construction that is to be given to the deed executed by the defendant and his wife to the plaintiff, in connection with the writing upon the back thereof, signed by the plaintiff.

The case shows that the said writing was signed by the plaintiff before the deed was executed and delivered by the defendant, so that their legal effect and operation were simultaneous, and they must be regarded, as they in fact were, one and the same transaction, and constitute in reality but a single instrument. Regarding it in that light, what is the legal effect of the whole taken together? The deed is executed by the defendant upon the express stipulation on the

part of the plaintiff that the premises shall be reconveyed on the payment of a stipulated sum of money at the expiration of a specified time. If the substance of this stipulation had been embraced in the body of the deed in the form of a condition that the deed should be void, or the premises reconveyed on the payment of such sum of money, there could be no question that the instrument would have been a mortgage. If the grantee accepts the deed, he takes it subject to such condition. If this stipulation had been inserted in the body of the deed, and the deed then signed by both parties, the result would have been the same. It would then only have expressed in terms the legal operation of a strict mortgage, the only difference would be in the mode of revesting the title. In the one case, the payment of the money or discharge of the mortgage would be sufficient; in the other, a deed would be necessary.

Instruments of this character are always to be construed according to the intentions of the parties, to be derived from the instrument itself. Now, we think it is perfectly apparent that this instrument was executed by the one, and accepted by the other, subject to the condition written upon the back of it, and that it was intended to be a mortgage to secure the payment of the said sum of eight hundred and fifty-one dollars, and such, we think, is its true legal effect, and that it should receive the same construction that would be given to it if the condition was inserted in the body of the deed.

The conduct of the parties tends to show that such was their understanding. The fact that the grantor remains in possession is always regarded as a strong circumstance tending to show that the deed is a mortgage.

But it is said this instrument cannot be regarded as a mortgage, as there was no debt existing on the part of the grantor to be secured by it. There is nothing in this case to show that there was no such debt, but on the other hand, the only inference to be drawn from the paper itself is, that there was such a debt. There may be no other written evidence of a debt than that furnished by the deed, but all the authorities agree that none is necessary to sustain a mortgage. Kent, in his Commentaries, volume 4, page 145, says that "the absence of any bond or covenant to pay the money will not make the instrument less effectual as a mortgage."

That this instrument would, in a court of chancery, be regarded as a mortgage on its face, there can be no doubt, and we think it equally clear that such is its fair legal construc-

tion. This being the case, by our statute the grantor is entitled to the possession until the condition is broken; and as the case shows that the condition had not been broken at the time this suit was commenced, the action cannot be maintained.

Judgment of the county court is reversed, and judgment entered for the defendant.

TRANSACTION, WHEN MORTGAGE AND WHEN CONDITIONAL SALE: See *Turnipseed v. Ounningham*, 50 Am. Dec. 190; *Williamson v. Culpepper*, Id. 175; *Elland v. Radford*, 42 Id. 610, and the notes thereto.

POWERS v. SKINNER.

[34 VERMONT, 274.]

AGREEMENT TO RENDER SERVICES AS LOBBY AGENT, or to exert personal influence and solicitations to procure the passage of a public or private law by the legislature, is void as being prejudicial to sound legislation, and in contravention of public policy.

AGREEMENT TO PAY FOR SERVICES IN CONDUCTING APPLICATION TO LEGISLATURE IS VALID, it seems, if made either to the legislature itself, or to some committee thereof, as a body.

SERVICES IN PROCURING LEGISLATION SHOULD CLEARLY APPEAR TO BE LEGITIMATE, or they cannot be recognized as the basis of a legal claim.

BOOK-ACCOUNT. The material facts are stated in the opinion.

P. T. Washburn, for the plaintiff.

Dudley C. Denison, and Peck and Colby, for the defendant.

By Court, KELLOGG, J. Courts of justice have, with jealous care, endeavored to protect every branch of the government from all illegitimate and sinister influences and agencies; and it has been settled by a series of decisions, uniform in their reason, spirit, and tendency, that an agreement in respect to services as a lobby agent, or for the sale by an individual of his personal influence and solicitations to procure the passage of a public or private law by the legislature, is void as being prejudicial to sound legislation, manifestly injurious to the interests of the state, and in express and unquestionable contravention of public policy: *Clippinger v. Hepbaugh*, 5 Watts & S. 315 [40 Am. Dec. 519]; *Wood v. McCann*, 6 Dana, 366; *Marshall v. Baltimore and Ohio R. R. Co.*, 16 How. 314; *Harris v. Roof*, 10 Barb. 489; *Rose v. Truax*, 21 Id. 361; *Bryan v. Reynolds*, 5 Wis. 200 [68 Am. Dec. 55]. The principle of these decisions has no respect to the equities between the par-

ties, but is controlled solely by the tendency of the contract; and it matters not that nothing improper was done, or was expected to be done, under it. The law will not concede to any man, however honest he may be, the privilege of making a contract which it would not recognize when made by designing and corrupt men. A person may, without doubt, be employed to conduct an application to the legislature as well as to conduct a suit at law, and may contract for and receive pay for his services in preparing and presenting a petition or other documents, in collecting evidence, in making a statement or exposition of facts, or in preparing and making an oral or written argument, provided all these are used, or designed to be used, either before the legislature itself, or some committee thereof, as a body; but he cannot with propriety be employed to exert his personal influence, whether it be great or little, with individual members, or to labor privately in any form with them, out of the legislative halls, in favor of or against any act or subject of legislation. The personal and private nature of the services to be rendered is the point of illegality in this class of cases: *Sedgwick v. Stanton*, 14 N. Y. 289.

Our government, in theory, is founded on the most exalted public virtue, and the principle which forbids the legal recognition of any contract for such services is so essential to the purity of the government, and is so firmly established as a rule of public policy, that it requires no vindication. It has not been questioned by counsel in argument, and no member of the court has had any doubt in respect to its propriety, or any hesitation in recognizing its authority. It is equally well settled that where a contract is an entire one, and contains an element which is legal, and one which is void as being against public policy, it cannot be sifted, so that the legal service rendered under it, or in its pursuit, can be separated from the illegal service, and a recovery had for so much of the service as would, if considered by itself, be adjudged to be legal. If any part of an indivisible promise, or any part of an indivisible consideration for a promise, is illegal, the whole is void, and no action can be maintained on it: *Chitty on Contracts*, 536 c; *Filson v. Himes*, 5 Pa. St. 452 [47 Am. Dec. 422]; *Ross v. Truax*, 21 Barb. 361.

The plaintiff seeks to recover in this action for services rendered by him before the legislature of this state in the year 1853, in aid of an application for a charter for a bank at Roy-

alton, under a contract or agreement made with him by the defendant; and he relies upon the contract as the only ground for the defendant's liability. The important question in the case, therefore, is, whether the contract relied on to support the plaintiff's claim contained any illegal element or feature; and this must be determined by the facts reported by the auditor in reference to the character of the services which the contract called for, as understood by the parties. On this point in the case, we have not had entire unanimity in our conclusions; but our difference of opinion arose exclusively upon the interpretation of the auditor's report, and not upon any principle applicable to the facts stated by the auditor.

In the case of *Norman v. Cole*, 3 Esp. 253, it was held that *assumpsit* would not lie to recover back money deposited for the purpose of being paid to a person for his interest in soliciting a pardon for a person under sentence of death, and on the case being opened, Lord Eldon, C. J., expressed a doubt whether the action was maintainable, saying that he "would hold the plaintiff to very strict proof of the means used to procure the pardon." The reason and spirit of this remark is, in our judgment, especially applicable to claims for services like those charged in the plaintiff's account. Such services should clearly appear to be legitimate, or they cannot be recognized as the basis of a legal claim. The auditor has found that the contract was a promise on the part of the defendant to pay the plaintiff five hundred dollars "in consideration that the plaintiff engaged to labor faithfully before the legislature of 1853 for a charter of a bank at Royalton." This statement of the contract, taken by itself, throws but very little light on the character of the services which the plaintiff expected or undertook to render, and is consistent with the claim that no illegal service was contemplated or stipulated for by the contract; but the auditor has also found that while no contract was made that the plaintiff should use any specific means to effect his purpose, "he was expected to, and did, solicit members of the legislature in behalf of his project as he had opportunity." A majority of the court are of opinion that this statement is equivalent to an express finding by the auditor that the contract, as understood by the parties, contemplated the use or exercise by the plaintiff of his personal solicitations and influence with individual members of the legislature in support of the application which he was employed to favor and promote; and the other facts reported by

the auditor, if they do not strengthen this conclusion, cannot be regarded as impairing it or as furnishing any aid to the plaintiff's claim.

The only services rendered by the plaintiff, which are stated or described by the auditor in his report, are clearly such as cannot be made the subject of a legal claim. The law lends no sanction or support to contracts for such services, but leaves the party who seeks the wages for his service to rely on the honorary obligation alone. It is not within the province of courts of justice to balance or adjust the equities growing out of such transactions. In this view of the contract under which the plaintiff's services were rendered, it is apparent that it contained an illegal element, and was, for that reason, wholly void. As the plaintiff's claim rests upon no other ground for support, there can be no recovery upon it.

Judgment of the county court in favor of the defendant, upon the auditor's report, affirmed.

BARRETT, J., filed a dissenting opinion.

BARRETT, J., dissented, not, however, because he did not agree as to the principles and rules of law which governed the kind of agreements under consideration, but because he differed with the court in their application, being of the opinion that the contract reported by the auditor was not an agreement to employ improper means.

AGREEMENTS TO INFLUENCE LEGISLATION, WHEN VOID: See *Clippinger v. Hepbaugh*, 40 Am. Dec. 519, and note; *Hunt v. Test*, 42 Id. 659; *Bryan v. Reynolds*, 68 Id. 55; note to *Boyd v. Barclay*, 34 Id. 766. The principal case is cited in *Barron v. Tucker*, 53 Vt. 340, to the point that an agreement to render services as a lobby agent is illegal; and see it referred to in *Maguire v. Smock*, 42 Ind. 5, on the general proposition as to contracts against public policy.

CRAGIN v. FOWLER.

[34 VERMONT, 326.]

VENDOR IS NOT BOUND TO PAY FOR ARTICLE, VALUELESS AS PURCHASED, and for the purpose for which it was purchased; and it is no answer for the vendor to say, in an action by him upon a note given for the price, that the vendee has something which can be made useful in some different manner, or for some other purpose.

ASSUMPSIT on a promissory note. The facts are stated in the opinion.

Washburn and Marsh, for the plaintiff.

Converse and French, for the defendant.

By Court, PIERPOINT, J. This action is upon a promissory note. The defense is failure of consideration. The note was given for the exclusive right to make, vend, and use, in a portion of the state of Illinois, a patent broadcast seed-sower, which right was then owned by the plaintiff, and which he transferred to the defendants on the execution of the note in suit.

It appears from the original letters patent, with the specifications and drawings attached and constituting a part thereof, that were introduced by the plaintiff, that it was the object, intent, and purpose of the patentee to get patented a machine that would distribute seed evenly and rapidly, and be operated by horse-power; the specifications and drawings are all made on that principle, and do not indicate any other method by which the machine was designed to or could be made to operate so as to accomplish the object.

The plaintiff also introduced evidence tending to show that after the patent was obtained, and before the sale, various machines were made according to the plans and specifications, all to be operated by horse-power. There is nothing in the case to show that at the time of the sale any machines had ever been made, except such as were to be operated by horse-power, or that the inventor or any other person had then entertained the purpose, or conceived the idea, of operating the machine by any other power. It is apparent that the only machine that the parties had in view as the subject-matter of their contract was to be operated by horse-power. In that, undoubtedly, consisted its principal merit.

It is a matter of history that the farmers and inventors of the country have long sought for a machine that should sow seed properly, rapidly, and be operated by horse-power; the great object being to save manual labor and time. Such a machine these parties undoubtedly supposed they had before them, and it was for the exclusive right to make, sell, and use such machines, within certain limits, that this note was given.

The defendants' testimony tended to show, and the jury have found by their verdict, that machines constructed upon the principle described in the specifications, and according to the plans and drawings attached to and constituting a part of the letters patent, are entirely worthless.

To rebut the testimony introduced by the defense, the plaintiff produced testimony tending to show that some time after the contract was entered into by these parties, it was discov-

ered that by so reducing the dimensions of the machine that it could be carried by a man, and varying its construction so far as to admit of its being operated by hand, and without altering it in those particulars that were protected by the patentee, it could be used successfully, and would be of some value, and thereupon requested the court to instruct the jury that if the machine, thus modified, was of any value for use, there was not an entire failure of consideration, and that under the well-settled rule in this state, that a partial failure of consideration cannot be set up as a defense to a note, the plaintiff was entitled to recover the full amount of it. The court declined so to charge, and in this it is claimed there was error.

Conceding that a hand-machine may be constructed, including the same combination as the horse-machine, so as to be protected by the patent, and that the hand-machine so constructed would be of some value, still the right to construct and sell the hand-machine was not what the parties contracted for; and although it does not appear that the grant specifically named horse-power as that by which it was to be operated, yet the specifications describe, and the plans illustrate, a machine made to move upon wheels, and to be moved and operated by means of power applied to it by a horse or other like animal connected with the machine by the appliances ordinarily used to connect such animals to wheeled carriages, with a seat attached, to be occupied by the driver of the animal. With a machine constructed according to the plan, and that would operate according to the specifications, the entire labor of moving the machine and the driver, and of distributing the seed, is performed by the animal, and necessarily with great rapidity. The owner takes his place upon the machine, guides it as he chooses, and the desired labor is performed through the instrumentality of the machine and the horse. A machine that would thus operate, all can see would be of great value, and so the parties undoubtedly regarded it. In this case, the jury have found that a machine constructed according to the plan will not operate according to the specifications, and is valueless, and consequently the right to make and sell such is also valueless.

The hand-machine, although involving the same combination that is patented, is in all its substantial and most important and valuable features an entirely different thing; instead of carrying the man, it must be carried by him; instead of being operated and having the seed distributed by the power

of a horse, it must be done by the man. There can be no substantial saving, either of time or labor, by means of the hand-machine. Again, the right to make and vend the hand-machine constituted no part of the actual consideration of the note. The idea of making such a machine had not then been conceived; to originate and develop such an idea required inventive genius and mechanical skill. The purchaser is not required to bring these qualities to bear in order to construct a different machine to give value to and to avail himself of that which he had purchased, and which, as he purchased it, was valueless.

If the hand-machine had been constructed at the time of the purchase, so as to have been in the contemplation of the parties at the time, and have constituted a part of the consideration, the case would have presented a different question; there would then have been only a partial failure of consideration.

Here there is an entire failure of consideration; that which was purchased was valueless as it was purchased, and for the purpose for which it was purchased, and it is no answer to say, "although this is true, you have, after all, got something that can be made useful in some different manner or for some other purpose." The party has the right to that for which he bargained, substantially, and it must be of some value, or he is not bound to pay for it.

But it is said that if the defendant is allowed to avoid the note, he still retains the right to make and sell the hand-machines under his grant. We think if the defendant should attempt to do this, after having repudiated and avoided the contract on his part, the plaintiffs' counsel would soon devise some method that would effectually protect the rights of the plaintiffs in this respect.

Judgment of the county court affirmed.

VENDOR MAY SHOW THAT ARTICLE IS OF NO VALUE in an action for the price: *Harman v. Sanderson*, 45 Am. Dec. 272; and see *Perley v. Balch*, 34 Id. 56; *Getty v. Rountree*, 54 Id. 138, and note.

HOLDEN v. SHATTUCK.

[34 VERMONT, 236.]

OWNER OF LAND THROUGH WHICH HIGHWAY IS ESTABLISHED RETAINS FEE of the soil embraced within its limits, with the full right to its enjoyment in any manner not inconsistent with the enjoyment of the easement by the public for the purpose of a highway, and this right is exclusive against all other persons.

OWNER IS UNDER NO OBLIGATION TO FENCE HIS LAND ALONG HIGHWAY in Vermont; except that it is his duty to restrain his own cattle from trespassing upon his neighbors.

DOMESTIC ANIMAL'S BEING IN HIGHWAY CANNOT OF ITSELF BE REGARDED AS UNLAWFUL, rendering the owner liable for injurious consequences that may accidentally flow therefrom. In order that it should be wrongful, it should appear that the circumstances and occasion, or the character and habits of the animal, were such as to show carelessness on the part of such owner in reference to the convenience and safety of travelers on the highway.

CASE. The facts are sufficiently stated in the opinion.

J. F. Deane, for the plaintiff.

Andrew Tracy, for the defendant.

By Court, BARRETT, J. The declaration in this case counts upon the neglect, on the part of the defendant, of his duty to restrain and take care of his horse, and keep him from being at large in the highway, through which neglect the said horse, being at large, with great force and violence started and ran about and before the horse of the plaintiff, which thereby became restive, and frightened, and ungovernable, and ran along said highway, and by reason of such fright, ran out of said highway, and became damaged, etc.

There is no averment of any vicious quality or habit in the defendant's horse known to the defendant. The only fault alleged against him consists in letting his horse, through negligence and carelessness, be in the highway, in violation of his duty to restrain and keep him out of the highway. The residue of fault charged consists in the conduct of the horse in running about and before the horse of the plaintiff, as he was driving along said highway.

The evidence shows that the defendant's horse came out of his lot through a doorway that, as the jury have found, got open through the carelessness of the defendant, and was feeding from the roadside of the fence on the oats of the defendant growing on the other side, when the plaintiff was driving along the highway lying through the defendant's farm. It

also shows that all the faulty conduct of the defendant's horse, as charged in the declaration, occurred along the highway within the limits of the defendant's adjacent land. It contains nothing tending to show that the defendant had any knowledge of any vicious or roguish trick or propensity in the respect complained of, or indeed, that he had any such propensity or trick, save that on a single prior occasion, when he happened to be in the highway, he pranced about as another horse was passing along.

The whole trial, including the charge of the court, proceeded upon the assumption that the defendant had no right to have or permit his horse to be loose in the highway, and that if he was there through the carelessness of the defendant, he, the defendant, was liable in law to respond to any damage that should be caused thereby.

If this is the true view of the subject, we should have no great difficulty in upholding the verdict under the charge in its relation to the evidence given on the trial.

Under the last of the series of requests made by the defendant for a charge, the question is directly raised whether the law, as to the duty of the defendant to restrain his horse from being in the highway, was warrantably assumed to be as was held by the county court, as the basis of the right of action set forth in the declaration.

It is too familiar to warrant debate that the owner of land through which a highway is established retains the fee of the soil embraced within its limits, with the full right to its enjoyment in any manner not inconsistent with the enjoyment of the easement by the public for the purpose of a highway. He has the right to the herbage, and whatever else is of value to any extent not infringing the proper maintenance and use of the public thoroughfare; and this right is exclusive against all other persons: *Perley v. Chandler*, 6 Mass. 454 [4 Am. Dec. 159]; *Stackpole v. Healy*, 16 Id. 33 [8 Am. Dec. 121]; *Jackson v. Hathaway*, 15 Johns. 447 [8 Am. Dec. 263].

Under our more recent statutes, the law now is in this state, as it ever has been in England, and other of the American states, that the owner of land is under no obligation to fence his own land along a highway. The obligation in this respect results only from his duty to restrain his own cattle from trespassing upon his neighbor. He may leave open his own land to the highway, and his cattle may enjoy the full range of the margin in devouring the herbage or in other pastimes, with-

out trespassing upon anybody, and without giving any individual of the public any ground of complaint, unless he is guilty of some fault through which the enjoyment of the public easement is impaired.

It must be equally his right to let his cattle or horses be in the highway along through his land in case the same should be inclosed by side fences, subject to the same condition in favor of the easement to be enjoyed by the public: *Avery v. Maxwell*, 4 N. H. 36. It follows, then, as matter of course, that the mere fact of a domestic animal, as a cow or a horse, being in the highway in this manner cannot be regarded as unlawful—a breach of duty—rendering the owner liable for all injurious consequences that may accidentally flow therefrom. Something more must exist in concurrence with that fact in order to predicate fault in the owner that will render him thus liable. If the animal have the character and habit of peaceableness and quietude, it is impossible to say that there would be any breach of duty, at suitable times—as in the open day, and in the ordinary course of the use of highways in farming neighborhoods, to permit, either by design or by accident, such animal to be loose in the highway within the limits of his own farm. There may be times and occasions when it would be a culpable fault so to do, and would subject the owner to such damage as might result therefrom. For instance, to permit animals to occupy the highway by night, with the likelihood of their lying down for their rest in the travel path, and by thus obstructing it, causing accident and damage. But in such cases, the question of fault would have to be submitted to the jury upon all the circumstances under proper instructions, as to the respective relative rights and duties of the land-owner, and the public.

As before remarked, the only fault charged upon the defendant, as subjecting him to liability in this case, is the fact that he negligently and carelessly failed to restrain his horse from being in the highway; all the rest is charged to the conduct of the horse itself, so being in the highway.

It is obvious that both must concur, in order, upon the plaintiff's own theory, to subject the defendant to the liability claimed.

If, therefore, in the eye of the law, fault in the defendant cannot be predicated upon the mere fact of his horse being in the highway, it is obvious that there remains no sufficient ground for charging him with liability for the resulting dam-

age. To hold the defendant thus liable, upon the view in which the declaration was framed and the case was tried, would seem to result in making him the absolute insurer against all casualties that should occur to travelers in consequence of his cattle or horses being in the highway for any other purpose or reason than merely that of using such highway as a thoroughfare.

Now, we do not understand the law of the subject to visit such a responsibility upon the defendant. The right of the public to the enjoyment of the easement is unquestioned. The right of the land-owner to any use of the margin of the highway in any manner not inconsistent with that right of the public is equally unquestioned. The mere fact of a horse or cow being in the highway, and upon the margin depasturing or standing, is, in itself, in no way inconsistent with the right of the public. Whether there by accident or design can make no difference in this respect. In order to constitute the being there of such animal wrongful on the part of the owner, it should appear that the circumstances and occasion, or that the character and habits of the animal, were such as to show carelessness on the part of such owner in reference to the convenience and safety of travelers on such highway; and only in this way do we think he should be subjected to liability for accidental injury and damage that may ensue in such a case.

Much is said in the books and cases about its being unlawful to permit cattle to run at large in the public highways; but on examination, it will be found that such unlawfulness is asserted in reference to the rights of adjoining land-owners, who may claim entire immunity from the cattle of others even without any fence against them along the highway. We do not at present, as it is not necessary, undertake to say whether in this country persons may or may not let their cattle run at large and depasture along the margin of the road through another's land. There has been a period when in this state no remedy could be asserted by suit for such an act; and it has sometimes been intimated that it was a kind of local common law, that cattle might thus depasture.

This, however, was when our statute required land-owners to maintain lawful fences on highways in order to entitle them to impound cattle that had passed from the highway on to their land. That statute not now being in existence, it may admit of question whether we should not now regard our-

selves as standing on the English common law on this subject. But it is needless to discuss the subject in this direction.

The judgment is reversed and cause remanded.

OWNER OF LAND THROUGH WHICH HIGHWAY PASSES RETAINS FEE OF SOIL: *Lewis v. Jones*, 44 Am. Dec. 138, and prior cases in note; *Southerland v. Jackson*, 50 Id. 633; *Nicholson v. New York etc. Co.*, 56 Id. 390; *Brainard v. Clapp*, 57 Id. 74; *City of Dubuque v. Maloney*, 74 Id. 358.

HERBAGE GROWING ON HIGHWAY BELONGS TO OWNER OF FEE: *Tonawanda R. R. v. Munger*, 49 Am. Dec. 239; *Brainard v. Clapp*, 57 Id. 74; *City of Dubuque v. Maloney*, 74 Id. 359.

OWNER OF LAND, WHETHER OBLIGED TO FENCE HIS CATTLE IN: *Waters v. Moss*, 75 Am. Dec. 561, and note collecting prior cases; *Lawrence v. Combs*, 72 Id. 332; *Knox v. Tucker*, 77 Id. 233; *Jones v. Witherspoon*, 78 Id. 263.

OWNER OF DOMESTIC ANIMAL, WHEN LIABLE FOR ITS MISCHIEVOUS OR VICIOUS PROPENSITIES: See *Decker v. Gammon*, 69 Am. Dec. 99, and notes thereto.

TREASURER OF THE STATE OF VERMONT v. MANN.

[34 VERMONT, 371.]

OBLIGATION OF OFFICIAL BOND ONLY EXTENDS FOR PERIOD NAMED IN CONDITION, or for the term fixed by law, and does not cover any extension of the time by a future appointment, or subsequent election, although the language of the condition as to time is general and unlimited, where the appointment is for a limited period, which is recited in the condition, or is fixed and determined by law, when not so recited.

OFFICIAL BOND DOES NOT COVER DEFAULTS OCCURRING AFTER EXPIRATION OF TERM OF OFFICE under the first election, where it was given by a person on his election as director of a bank, conditioned for the due performance of his duties as director "while he shall be a director of said bank," and he was annually re-elected for several years afterwards, but never gave any other bond.

OFFICE OF BANK DIRECTORS IS ANNUAL ONE, where they are required to be elected annually, although it is provided that they shall hold office until others are elected and qualified, and they are forbidden to enter upon the duties of their office until their bonds have been executed and approved.

DEBT upon an official bond. The facts are stated in the opinion.

C. W. Clark and Lucius B. Peck, for the plaintiff.

P. Perrin and P. T. Washburn, for the defendants.

By Court, POLAND, C. J. The principal defendant, Mann, was chosen a director of Orange County Bank in January, 1849, and at that time executed a bond, in which the other defendants joined as his sureties, conditioned to secure the

due performance by the said Mann of his duties as director, "while he shall be a director of said bank." Mann was re-elected a director in 1850, 1851, and 1852, and served as such during those years, but never executed any other bond. The alleged breach of duty by Mann as director, for which it is claimed the defendants are liable in this action on the bond, occurred after the expiration of the term of office under the election of 1849, and while Mann was acting as director under his subsequent elections. The important question in the case is, whether this bond bound the defendants for the fulfillment by Mann of his duty as director under future elections, or only for the year or term for which he had been elected. It seems now to be perfectly settled by authority, in reference to bonds or obligations given to secure the performance of official duties, that where the appointment is for a limited period, which is recited in the condition, or where it is not recited in the condition, but is fixed and determined by law, the obligation only extends for the period named in the condition, or the term fixed by law, and will not be extended to cover any extension of the time by a future appointment, or subsequent election, although the language of the condition, as to time, be general and unlimited. The presumption in such cases is held to be that the language is used in reference to the existing office or appointment which the principal holds, and that the sureties do not intend to bind themselves for any indefinite and unlimited extent of time, depending upon the contingency of future elections. In *Peppin v. Cooper*, 2 Barn. & Ald. 431, Bayley, J., said, speaking of a bond by a collector of rates: "I do not mean to say that a bond for a longer period would be absolutely void, but merely that there ought to be very strong words to show that clearly to be the intention." But the words in that case were held not to be strong enough, though they were pretty strong words, as will hereafter be seen, nor have I seen any case where they have been found strong enough. It may be worth taking time to refer to some of the principal cases on this subject.

The earliest and leading case is *Lord Arlington v. Merricks*, 2 Saund. 411. The plaintiff, as postmaster-general, had appointed one Jenkins a deputy postmaster for six months, and the defendant executed a bond with Jenkins, conditioned that Jenkins should faithfully perform the duties of his appointment "for and during all the time that he, the said Thomas Jenkins, shall continue deputy postmaster," etc. Jenkins was

continued in office by further appointment for some three or four years, when he became a defaulter. It was held that the defendant was only holden for the six months for which Jenkins was first appointed, that time being recited in the bond, and that the general words of the condition should be limited to that.

Liverpool Water Works Co. v. Atkinson, 6 East, 507, was the case of a bond for the faithful performance of duty by a person who had been appointed an agent to collect rents for the plaintiffs. The condition recited that he had been appointed for twelve months, but it went on to add that the agent should "so long as he should continue, and be employed by the company from time to time," use due diligence, etc. The agent was continued in this service by the company beyond the year, and after the expiration of the year was guilty of a default. It was held that the bond only covered the year.

Wardens of St. Saviour's etc. v. Bostock, 2 Bos. & Pul. N. R. 175, was an action on a bond given to the plaintiffs for a collector of church-rates. The condition was in general terms that Armstrong, the collector, should collect all rates that should be thereafter put into his hands to be collected, and that he should, from time to time, surrender and deliver over on request to the wardens for the time being, or hereafter to be appointed, all moneys collected, etc. Armstrong continued to be collector for several years by annual reappointment, and eventually was delinquent. It was not recited in the bond that Armstrong had been appointed for one year, but as the office was by law annual, it was held that the obligation of the bond should be construed to have reference to that, and to extend and cover only the period for which he had been appointed when the bond was executed.

In *Peppin v. Cooper*, 2 Barn. & Ald. 431, the defendant executed a bond conditioned that a collector of parish-rates should, from time to time, and all times thereafter, collect and pay over, etc. In this case, also, the term of the collector's appointment was not named in the bond, but as the office was by law annual, it was held that the language of the condition must refer only to his existing appointment, and not to future appointments under which the collector was continued in office.

Leadley v. Evans, 2 Bing. 32, 9 Eng. Com. L. 306. This was an action on a bond, conditioned that a collector of church and poor rates should, from time to time, and at all times hereafter, collect and pay over, etc., to the church-wardens, or

to their successors, etc. The collector was continued in office several years by annual appointments, and was finally delinquent, but not so during the first year. It was again decided that as the office of collector was by law annual, the language of the condition must be limited and construed by that, notwithstanding the unlimited and continuous words used; that the sureties must be understood as contracting in reference to his existing appointment, and not for any period contingent upon another election. In a very recent English case, *Mayor etc. of Cambridge v. Dennis*, reported in El. Bl. & El. 660, and also in 5 Jur., N. S., 265, one Smith was appointed treasurer of the borough of Cambridge in 1839, and the defendants executed a bond conditioned that Smith should well and faithfully account to the plaintiffs for all and every sum and sums of money which might come to his hands, or be by him received as such treasurer as aforesaid, and should in all things well, truly, diligently, and faithfully, to the best of his abilities and according to the provisions of the statute hereinbefore mentioned, and of such statutes as may be hereafter passed relating to the said office, etc. At the time of the execution of the bond, the office of treasurer was an annual appointment, and Smith was continued in office by annual appointments until 1843, when an act was passed by which the appointment of treasurer was to be during the pleasure of the council of the borough, and Smith was again appointed under this provision, and continued in office till his death in 1857, when he was found largely in arrear.

The question was in this case, whether the bond of the defendants was a continuing security for the whole time Smith continued in office, or only for the year for which he was first appointed; and it was again decided that as the office was annual when the bond was given, its language must be referred to the known period of the office under the existing appointment, and the reference to statutes which might be passed affecting the office was only to such as might be passed within the year; though Lord Campbell said that, in his judgment, the language of the condition was so strong that the sureties must in fact have looked beyond the current year, and acted on the supposition that the security ran on as long as the party was in office.

In addition to other cases cited by counsel, where the same principle is recognized, I would refer to *Mayor of Berwick on Tweed v. Oswald*, 16 Eng. L. & Eq. 236; *Augero v. Keen*, 1 Mee. & W. 390; *Hassell v. Long*, 2 Mau. & Sel. 363.

Notwithstanding the provision that the directors should hold their office until others are elected and qualified in their stead, we are of opinion that the office must be regarded as annual. The directors are expressly required to be elected annually, and the day of election is fixed, but as there might possibly be a failure to elect on that day by the inability of the stockholders to agree, or for some other cause, provision is made for an election on a subsequent day, in such cases. The statute contemplates no such thing as the directors continuing in office for several years under one election, and the sureties in a director's bond could not be supposed to understand or intend more than the legislature did, by this provision; viz., that it provided for the continuance of the office for such short interval as might be necessary to hold another election. This same provision exists in reference to all town and school district officers, who hold their offices by annual elections, but it was never supposed to divest them of the character of annual officers. The case of *Bigelow v. Bridge*, 8 Mass. 275, is a clear authority against the plaintiff on this point.

The Massachusetts act, authorizing the appointment of county treasurers, provided that the person elected to the office should continue in office until some other person should be chosen and qualified in his room: See *Amherst Bank v. Root*, 2 Met. 522.

In view, therefore, of all the authorities on this subject, and of the general principle applied to all contracts of sureties, that they are not to be held beyond the precise terms of their contracts, we come to the conclusion that the defendants were not bound for the official conduct of Mann as director beyond the term for which he had been elected at the time the bond was given, and that when that terminated by the expiration of the year, and a new election, and no default had then occurred, their liability was at an end.

It is asserted that for many years in this state it was not the practice of bank directors to execute new bonds at each election, and that the general understanding was that bonds like the present were a continuing security for the whole period of their continuance in office under several elections; and we have no doubt that such was the case, though how general it was we do not know.

But such usage and practice, however general, we cannot regard as sufficient to overthrow the long and well settled rule of law on the subject, whatever might be the consequence of

now judicially asserting it in this state. But for a considerable time the practice has been changed in this state by the direction of the bank commissioner, and now by an express act of the legislature, so that we do not apprehend any serious mischief can result from adhering to the rule of the law. The view we have taken of the case renders it unimportant to decide the other questions made, whether Mann's default was of that character that would make his sureties liable if it had occurred while their bond was in force.

The judgment of the county court is reversed, and judgment rendered for the defendants.

SURETIES' LIABILITY ON OFFICIAL BONDS CRASES WITH TERM OF OFFICE: *South Carolina Society v. Johnson*, 10 Am. Dec. 644; *Hewitt v. State*, 14 Id. 259; note to *Commonwealth v. Cole*, 46 Id. 509; *Moss v. State*, 47 Id. 116; compare *Worcester Bank v. Reed*, 6 Id. 65; *Coplin v. McCalley*, 19 Id. 748.

BALDWIN v. ALDRICH.

[24 VERMONT, 523.]

PLEA THAT PREMISES ARE NOT PARTIBLE IS NO SUFFICIENT DEFENSE TO PETITION FOR PARTITION, which prays not only for partition, but that if the premises are not partible, that they may be assigned or sold pursuant to statute.

ASSIGNMENT OR SALE OF PREMISES OWNED IN COMMON WILL NOT BE REFUSED when they cannot be partitioned without great inconvenience to the parties interested, because the petitioner has not been hindered in the enjoyment of his share.

DEED CREATES SIMPLY LICENSE TO ERECT AND OCCUPY BUILDINGS, and to use water for them, in addition to conveying an undivided interest in all the premises, and this right expires with the decay of the buildings, where, after granting an undivided one half of the premises, the deed gives the grantee "the right to put in a mechanic's shop and planing-mill between the saw-mill and grist-mill, and to take water from the flume for the same, so as not to interfere with the use of the water for the saw and grist mills, or such machinery as may be substituted for them."

PARTITION, ASSIGNMENT, OR SALE MAY BE MADE OF THAT PART OF PREMISES OWNED IN COMMON, in Vermont, where, upon the trial of a petition for partition, it appears that the parties are tenants in common of only a part of the premises described in the petition.

PARTITION WILL NOT BE MADE OF REVERSIONARY INTEREST IN LAND covered by a license held by one of the tenants in common.

PETITION for partition. The facts are stated in the opinion.

Roswell Farnham and Abel Underwood, for the plaintiff.

R. McK. Ormsby, and Peck and Colby, for the defendant.

By Court, ALDIS, J. 1. The first and third pleas are demurred to.

The first plea states the premises are not partible. The petition prays, first, for partition, and second, if not partible, that the premises may be assigned or sold pursuant to the statute. Hence, a plea merely that they are not partible is no sufficient defense to the petition. The third plea states that the petitioner has not been hindered in his enjoyment of his share of the premises. Is that a good defense? The plea is drawn upon the basis and after the form in 1 Aikens.

In *Brown v. Turner*, 1 Aik. 350 [15 Am. Dec. 696], the petitioner prayed for a partition of a saw-mill, mill yard and pond. The court held the premises were not partible. Hutchinson, J., then proceeded to say: "This disposes of the whole case, for the only prayer is for partition. But if the prayer in the petition were for an assignment to one, or a sale of the whole, the court would not deem it proper to make any such order without different reasons from those which now appear. If the conduct of the petitioners were such that the petitioner could not enjoy his turn in the occupation of the premises, it would bear a different consideration."

All of the opinion that bears upon any controverted point in this case is clearly mere *dictum*. If Judge Hutchinson's opinion extended to this—that when property held in common could not be divided without great inconvenience to the parties interested, the court should refuse to make an order for assignment or sale pursuant to the statute, unless the petitioner could prove that he was hindered in the enjoyment of his share, we think the position untenable. There is nothing in the statute thus limiting or abridging the right of the petitioner or the power of the court. The first section of the statute provides that "any person holding real estate with others as joint tenants, tenants in common, or coparceners may have partition." The fourteenth section says: "When it shall appear to the court that such real estate, or any portion of it, cannot be divided without great inconvenience to the parties interested, they may order the same to be assigned to one of the parties," etc.; and section 15: "If no one of the parties will consent to take the assignment, the court shall order the commissioners to sell it at public or private sale," etc. Hence, by statute, on account of "the great inconvenience to the parties" of partition, assignment to one with his consent at an appraised price is first substituted; and if no one will consent,

then sale and a division of the proceeds come next. There is nothing to indicate that assignment and sale do not stand upon the same ground of common-law right as partition; or that they are to be put upon the narrow ground of proof of injury to the possessory right of the tenant. Nor is there, as we can see, any reason why such distinction should be made between property partible and not partible. If the tenant in common of a farm is always allowed by his co-tenant to have his turn in the occupancy, why has he any greater right to partition than the owner of a saw-mill enjoying his share in a like manner has to a division by assignment or sale. Both seem to us to stand in the common-law right, and to seek the same end for the same reasons, through proceedings necessarily dissimilar in their progress but arriving at the same result.

2. The second plea alleges that the plaintiff and defendant are not joint owners of the premises; but that the defendant owns a mechanic's shop and water privilege standing on a portion of the premises described in the petition, and has the whole title and interest in the same, and claims that the deed from B. P. and G. P. Baldwin to him, set forth in the petition, shows such his title. The plaintiff replies, setting forth his title under the same deed, and insists they are tenants in common, and so issue is joined; upon this, a trial was had by the court.

The Baldwins, being the sole owners of the premises, conveyed one half of the premises to the defendant. If the deed stopped here, the plaintiff and defendant, it is admitted, would be tenants in common of the whole. But in the deed, after granting one half to the defendant, there is this further clause: "With the right to said Aldrich to put in a mechanic's shop and planing-mill between the saw-mill and grist-mill, and to take water from the flume for the same, so as not to interfere with the use of the water for the saw and grist mills, or such machinery as may be substituted for them." The defendant has built the mechanic's shop on the land, and has been and is in the exclusive occupation of it. Has he a fee, or an easement, or only a temporary right by license?

We think it must be regarded merely as a license. Had the parties intended to pass the fee, they would have executed a deed in the usual form of the land intended to be conveyed. So the limiting the use to a mechanic's shop and planing-mill indicates the intent to grant the use for a temporary purpose,

but not to pass the fee. So the words, "with the right to said Aldrich," not to him, his heirs or assigns, show the like intent. We think it passes a right to erect and exclusively use the shop and planing-mill while they last, but that the right expires with the decay of the structure: *Hall v. Chaffees*, 13 Vt. 150; *Le Fevre v. Le Fevre*, 4 Serg. & R. 241; *Hepburn v. McDowell*, 17 Id. 383.

The plan of the premises and the exceptions show that the plaintiff and defendant are tenants in common of the saw-mill and mill-yard, and that the mechanic's shop covers but a very small portion of the premises. The defendant claims that his right to the shop and its exclusive possession defeats the plaintiff's right to a partition, not only of the shop and land covered by it, but also of the remainder of the premises; that the plaintiff must prove a joint interest in the whole of the premises described in his petition, in order to have judgment for partition.

We think the seventh section of the chapter on partition was intended to relieve the plaintiff from such strictness of proof, and to enable him to have a severance of the joint interest according to his right, though his interest is not correctly described in his petition. The words are, "if the petitioner holds a less share than he claimed in his petition, judgment shall be rendered that partition be made according to the title of the respective owners." It would, we think, be narrowing the meaning of the act to construe the word "share" to apply only to undivided interests, and not to superficial area. A party who declares for an interest in fifty acres, and proves an interest in only twenty-five, may as well have division of the twenty-five, as he who declares for an undivided half of fifty acres, and proves that he owns but a third, or that his third extends only to twenty-five acres, may have a division of such "less share." Such, too, the cases show has been the practice under the act. See *Howe v. Blanden*, 21 Vt. 315. The petitioners therefore are entitled to partition, or to assignment or sale of all of the premises described in the petition, except so much as the defendant has the exclusive possession of, by his mechanic's shop and the use thereof.

As to the reversionary interest which the plaintiff and defendant jointly own in the land on which the shop stands, we think the plaintiff is not entitled to partition.

It was decided in *Nichols v. Nichols*, 28 Vt. 228, that the joint owners of the reversion of a farm in which a third party

had a life estate could not have partition. This was put upon the ground that the petitioners had no possession or right of immediate possession, and could have no possession till the termination of the life estate. The reason given is that a just division, made during the existence of a life estate, might become an unequal one when the parties came to the possession of their land. The opinion of Judge Isham is so full on this point, and his review of the authorities is so complete, that we need but refer to that decision. We think it applies to this case.

Judgment is therefore reversed, and the case remanded to the county court for the appointment of commissioners to make assignment or sale of all the premises described in the petition, except so much thereof as is exclusively occupied by the defendant by his mechanic's shop, and for the use of the same.

PARTITION WILL NOT BE MADE OF REVERSIONARY INTEREST; *Strider v. Mett*, 22 Am. Dec. 646, and note; *Hubbard v. Ricart*, 23 Id. 198.

HADLEY v. CROSS.

[24 VERMONT, 586.]

DUE CARE AND REASONABLE DILIGENCE ARE NOTHING LESS THAN MOST WATCHFUL CARE AND ACTIVE DILIGENCE in any business involving the personal safety and lives of others.

LIVERY-STABLE KEEPER IS ANSWERABLE TO HIRER FOR INJURY WHICH HAPPENS BY REASON OF DEFECT IN VEHICLE HIRED, which might have been discovered by the most careful and thorough examination; but not for an injury which happens by reason of a hidden defect, which could not, upon such examination, have been discovered.

CASE. The plaintiff, Cyrus Hadley, hired of the defendant, a livery-stable keeper, a horse, wagon, and harness to go on a journey with his wife. While on the journey, in consequence of the breaking of a spring in the wagon, the horse became frightened, the wagon was capsized, and the plaintiff's wife was seriously injured. The wagon was claimed to be unsafe and insufficient. The question in the case, which arose upon instructions given and refused, is sufficiently stated in the opinion.

Heaton and Reed, for the plaintiffs.

O. H. Smith, and Redfield and Gleason, for the defendant.

By Court, POLAND, C. J. It is conceded on both sides that the same rule of duty and diligence should be applied to the letter of horses and carriages for hire for others to drive, as to coach-owners or other passenger carriers who furnish drivers as well as teams. The plaintiffs claim that the law holds both responsible for the absolute sufficiency of carriages, harnesses, etc., and that if the driver or passenger receives an injury by reason of a defective carriage or harness, he is entitled to redress, though the defect was not visible, and could not be discovered by the most careful examination.

The defendant claims they are only liable for the want of due care and reasonable diligence.

It seems now universally settled in this country that the strict rule of liability applied to common carriers of goods does not apply to carriers of passengers. While the carrier of goods is liable for any loss or injury that may happen to them, even with no fault on his part, unless occasioned by the act of God or the public enemy, the carrier of passengers is only liable for negligence. It is not needful now to discuss the policy on which this difference is founded.

Some of the books and cases say the carrier of passengers is only liable for the want of due care, or reasonable care; others say they are bound to extraordinary care, and the highest diligence, to insure the safety and security of their passengers.

But we apprehend there is no real difference in the meaning of these terms, as applied to the subject. In any business involving the personal safety and lives of others, what is due care, reasonable diligence? Clearly, nothing less than the most watchful care and the most active diligence; anything short of this is negligence and carelessness, and would furnish clear ground of liability, if an injury was thereby sustained.

The case of *Ingalls v. Bills*, 9 Met. 1 [43 Am. Dec. 346], settles what we deem to be the true view of the law on this subject. In that case, all the authorities are carefully reviewed, and the English cases now relied on by the plaintiff as establishing the principle of absolute liability are shown not to support it, though the language of some of the judges might seem to countenance such a doctrine. The principle established by that case is stated by the reporter as follows: "Proprietors of coaches, who carry passengers for hire, are answerable to a passenger for an injury which happens by reason of a defect in a coach, which might have been discovered by the most careful and thorough examination, but not

for an injury which happens by reason of a hidden defect, which could not, upon such examination, have been discovered." The principle settled by that case seems to have been carefully followed by the judge who tried this case, in his instructions to the jury.

The doctrine of the plaintiffs, by which the defendant would be held liable for defects in his carriages and harnesses, which he did not know, and which he could not have discovered by the most careful scrutiny, we think would be grossly unjust, and it is one not ordinarily applied to any other of the dealings and relations of society.

The judgment is affirmed.

LIABILITY OF COMMON CARRIER OF PASSENGERS FOR INJURIES RESULTING FROM DEFECTS IN VEHICLES: See *Hegeman v. Western R. R.*, 64 Am. Dec. 617, and exhaustive note.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

LAWSON'S EXECUTOR v. LAWSON.

[16 GRATTAN, 230.]

ASSUMPSIT FOR MONEY HAD AND RECEIVED will lie whenever one has the money of another which he has no right to retain, but which, *ex equo et bono*, he should pay over to that other. In such case, plaintiff is not bound to declare specially.

ACTION OF INDEBITATUS ASSUMPSIT has been greatly enlarged, and now embraces all cases in which plaintiff has equity and conscience on his side, and defendant is bound by ties of natural justice and equity to refund the money. In such cases, no express promise need be proved.

EXECUTOR MAY MAINTAIN INDEBITATUS ASSUMPSIT on the common counts when the money sought to be recovered is part of the assets of plaintiff's testator, and it is the duty of defendant to pay it over to plaintiff. In such case, he need not declare in trover.

EXECUTOR MUST DECLARE IN HIS REPRESENTATIVE CHARACTER when he sues in respect to a cause of action which accrued in the life-time of his testator.

EXECUTOR MAY DECLARE IN HIS OWN NAME, or in his representative character, when the cause of action accrued after the death of his testator, and the money if recovered would be assets.

THE opinion contains the facts.

Brent and Kinzer, for the appellant.

F. J. Smith, for the appellee.

By Court, **LEE, J.** The money sought to be recovered in this case was the property of the plaintiff's testator, in the form of bank notes, and was handed to defendant (his wife) a short time before his death, for safe-keeping, until he should be better, when, as he said, he would arrange it for the bank.

It remained in her possession during his life, and at his death, which took place a few days after, it was still his property. She made no claim to it as hers during his life, nor, so far as appears, did she dispose of any part of it to her own use, or that of her husband. After his death, the plaintiff, though before he had qualified as executor under the will of his testator, called on the defendant for the money, but she refused to surrender it, saying that she intended to keep it.

Now, as this money was part of the assets of the estate of the testator, it is clear that the plaintiff is entitled to recover it in some form of action, and in some character, either individual or representative.

But it is said that if the plaintiff be entitled to recover, he cannot do so in this action, but should have declared on the special case, or in trover and conversion.

I do not think the plaintiff was bound to declare specially. The action of *indebitatus assumpsit* for money had and received will lie whenever one has the money of another which he has no right to retain, but which, *ex æquo et bono*, he should pay over to that other. This action has of late years been greatly extended, because founded on principles of justice; and it now embraces all cases in which the plaintiff has equity and conscience on his side, and the defendant is bound by ties of natural justice and equity to refund the money. In such a case, no express promise need be proved, because from such relation between the parties the law will imply a debt, and give this action founded on the equity of the plaintiff's case, as it were, upon a contract, *quasi ex contractu*, as the Roman law expresses it, and upon this debt founds the requisite undertaking to pay: *Moses v. Macferlan*, 2 Burr. 1005, 1008, 1012, *per* Buller, J.; *Straton v. Rastall*, 2 T. R. 366, 370.

Here this money was part of the assets of the plaintiff's testator, and it was the duty of the defendant, *ex æquo et bono*, to pay it over to the plaintiff.

Nor do I think the plaintiff was bound to declare in trover and conversion. The money handed to the defendant by the testator was in bank notes, and if it be conceded that upon the refusal of the defendant to deliver the same to the plaintiff trover might be maintained as for a tort, it by no means follows that *assumpsit* could not be brought. There are many cases in which a party aggrieved, who has a clear remedy by action as for a tort, may waive the tort and sue in *assumpsit*. Thus an action against a common carrier is for a tort and sup-

posed crime, but *assumpsit* will lie for the same cause: *Per* Lord Mansfield, in *Hambly v. Trott*, 1 Cowp. 371, 375. So if a man takes a horse from another, and brings him back again, an action of trespass may be brought, but the owner may bring *assumpsit* for the use and hire of the horse: *Id.* If a bankrupt, on the eve of his bankruptcy, fraudulently deliver goods to one of his creditors, the assignees may recover the goods in trover, or waive the tort and bring *assumpsit*: *Smith v. Hodson*, 4 T. R. 211. If a stranger takes my goods and delivers them to another, a contract may be implied, and I may bring an action of trover for them or of *assumpsit* to recover their value: *Per* Lord Abinger, in *Russell v. Bell*, 10 Mee. & W. 350. In this case, it was decided that the assignees of a bankrupt who, after the bankruptcy, had delivered goods to the defendant to meet an accommodation bill which they were about to give the bankrupt, might waive a tort and sue in *assumpsit*. So a master whose apprentice has left him and entered into the service of another, who persuades him to remain with him after he had found out who he was, and from what shop he had deserted, may waive the tort and bring *assumpsit* against the defendant for the work and labor of the apprentice: *Foster v. Stewart*, 3 Mau. & Sel. 191; see also *Curtis v. Bridges*, Comb. 450; *Eades v. Vandeput*, 5 East, 39; *Lightly v. Clouston*, 1 Taunt. 112. So if a man take the goods of another and sell them, the owner may waive the trespass and sue him for money had and received: *Gilmore v. Wilbur*, 12 Pick. 120 [22 Am. Dec. 410]; *Foster v. Stewart*, 3 Mau. & Sel. 191; see also *Jones v. Hoar*, 5 Pick. 285. Other illustrations may be derived from the cases, but I will not stop to give them. I think that in no case could the exercise of the right to elect between an action in tort and *assumpsit* be more appropriate than in this. The bank notes were received and treated by the testator as money, and as such were received and retained by the defendant, and though trover might lie to recover the notes, the law will imply a promise to pay the amount to the plaintiff.

It is said, however, that the plaintiff can only recover in his character of executor, and that here he has not declared as executor, but in his individual character.

The cause of action here accrued after the death of the testator. He had and could have no cause of action against his wife, but her retention of the money gave to the plaintiff an action to recover it as part of the assets of the estate of his

testator. And although the demand by the plaintiff was before his qualification as executor, yet the refusal to pay was not upon that ground, but because she intended to keep the money as her own; and as she continued to keep it until after the plaintiff's qualification as executor, his right to sue accrued immediately upon his qualification. Now, where an executor sues in respect of a cause of action which accrued in the life-time of the deceased, he must declare in his representative character. But where the cause of action accrued after the death of the testator, if the money recovered will be assets, the executor may declare in his representative character or in his own name: *Mowry v. Adams*, 14 Mass. 327; *Kane v. Paul*, 14 Pet. 33. But if necessary, the declaration may, I think, in support of the justice of the case, be considered as a declaration in the plaintiff's character as executor. The circuit court so thought, for the judgment for costs against the plaintiff directed them to be levied of the assets of his testator. The plaintiff declared as executor of John Lawson, and the other allegations referring to him may reasonably be considered as referring to him in his character of executor; and upon the demurrer to evidence, I think they should be so considered.

I think the circuit court erred in rendering judgment for the defendant instead of for the plaintiff upon the demurrer to evidence, and the same should be reversed, and judgment now rendered for the plaintiff.

The other judges concurred in the opinion of LEE, J.

Judgment reversed and entered for the plaintiff.

ASSUMPSIT FOR MONEY HAD AND RECEIVED may be maintained whenever defendant has money to which, in equity and good conscience, plaintiff is entitled: *Little Rock Bank v. Plimpton*, 28 Am. Dec. 286; *O'Fallon's Adm'r v. Boismenu*, 26 Id. 678; *Culbreath v. Culbreath*, 50 Id. 375; *Merchants' Bank v. Raws*, Id. 394; *Frooman v. McKaig*, 59 Id. 85; *Osborn v. Bell*, 49 Id. 275, and notes to these cases; also that appended to *Wells v. Brigham*, 52 Id. 751, and *Allen v. Patterson*, 57 Id. 544, as to when *assumpsit* will lie on the common counts.

EXECUTOR MAY SUE IN HIS REPRESENTATIVE CAPACITY whenever the money, if recovered, would be assets in his hands: *Sasscer v. Walker*, 25 Am. Dec. 272, and note 276; see also *Wyatt's Adm'r v. Rambo*, 68 Id. 89, and note 100.

ADMINISTRATOR, WHEN MAY SUE IN HIS INDIVIDUAL CAPACITY: *Sims v. Boynton*, 70 Am. Dec. 540, note 544.

WHITE v. WHITE.

[16 GRATTAN, 264.]

COURT OF EQUITY CANNOT, unless it is impossible to assign dower, decree a sale of the whole property, and provide a moneyed compensation in lieu of dower, against the widow's will, however much it might be to the interests of the heirs to have a sale of the whole estate, and a moneyed compensation allowed the widow.

WIDOW ENTITLED TO DOWER is neither joint tenant, coparcener, nor tenant in common with the heirs at law, within the meaning of the Virginia statute concerning partition, so as to empower a court of equity to sell the whole estate against her will, and without her consent, and compel her to receive a moneyed compensation in lieu of dower.

DEED OF SLAVES IN TRUST to A for life, and after her death to B, and the heirs of her body forever, but should B die without heir or heirs of her body, then to C, with a further limitation over, does not create a separate estate in B; and upon her marriage the marital rights of her husband attach to such interest as she took under the deed, and such interest should be disposed of, as was the other personal estate of the husband after his death.

FAILURE OF WIDOW TO MAKE EXPRESS CLAIM to perishable personal estate of her deceased husband does not bar her right to her distributable share of the proceeds of a sale thereof.

BILL in equity. The facts are stated in the opinion, except those relating to the deed therein mentioned. They are as follows: Lawrence Battaile, jun., conveyed by deed a certain slave, Nancy, and her children, John and George, with her future increase, in trust for the benefit of his mother, Ann H. Battaile, during her life, and at her death to Ann C. Battaile, and the heirs of her body forever. But should the latter die without heir or heirs of her body, then to Sarah R. Battaile; with a further limitation over, should the latter die without heir or heirs of her body. Ann C. Battaile, the appellant, afterwards married Edmund P. White, now deceased.

R. T. Daniel, for the appellant.

Barton and Herndon, for the appellees.

By Court, **LEE, J.** The court is of opinion that as it is not made to appear that it was impossible to assign to the appellant her dower of and in the real estate of her husband, it was not competent for the court of equity, in the exercise of its general power, to decree a sale of the whole property, and to provide a compensation in money to the appellant in lieu of her dower, against her will and without her consent, however much it might be to the interest of the heirs at law of the

decedent to have a sale of the whole estate and a moneyed compensation allowed to the appellant, instead of a sale of two thirds of the estate and the remainder in the life estate of the widow.

And the court is further of opinion that a widow, entitled to dower in the estate of her deceased husband, is neither a joint tenant, coparcener, nor tenant in common with the heirs at law, within the meaning of the statute concerning partition, in the code of Virginia; and that therefore no power is conferred by that statute upon the court of equity to sell the whole estate against her will and without her consent, and compel her to receive a moneyed compensation out of the proceeds in lieu of her dower.

And the court is further of opinion that whether the limitation in the deed of the said Lawrence Battaile, jun., of the nineteenth of March, 1827, was a good executory limitation over, or the contrary (as to which the court deems it unnecessary to express any opinion), yet that the said deed did not create a separate estate for the sole and exclusive use of the appellant; but that the marital rights of her husband attached upon such interest as she took under the said deed, and that such interest should be disposed of as the other personal estate of the said Edmund P. White, deceased.

And the court is further of opinion that if there was other perishable personal estate of the said Edmund P. White besides the said slaves, as seems to be contemplated by the said decree, the failure of the appellant to make any express claims to the same did not bar her right to an interest therein; and that the circuit court should have respected her right to a distributable share thereof, and not directed the whole proceeds of the sale of the same to be paid over to the children of the said Edmund P. White, deceased, to her exclusion.

Thus the court is of opinion that the said decrees are erroneous.

Therefore reversed with costs, and cause remanded, with directions to proceed in the same according to the principles hereinbefore declared, and further as justice and equity shall require. Which is ordered to be certified, etc.

Decrees reversed.

WIDOW'S RIGHT TO HER DISTRIBUTABLE SHARE of her husband's personal estate: See *Grattan v. Grattan*, 65 Am. Dec. 726; *Jackson v. Jackson*, 64 Id. 114.

WHEN IT IS NOT MADE TO APPEAR that it is impossible to assign to a widow her dower out of the real estate of her husband, it is not competent for a court of equity, in the exercise of its general power, to decree a sale of the whole property, and to provide a compensation in money to the widow in lieu of her dower, against her will and without her consent: *Wilson v. Branch*, 77 Va. 69; *Simmons v. Lyles*, 27 Gratt. 930, both citing the principal case.

THE PRINCIPAL CASE IS CITED with approval, but distinguished, in *Kerrison's Ex'rs v. Payne*, 32 Gratt. 392; S. C., 3 Va. L. J. 741.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

STROBE v. DOWNER.

[18 WISCONSIN, 10.]

FIRST MORTGAGEE IS NOT NECESSARY PARTY DEFENDANT TO FORECLOSURE OF SECOND MORTGAGE; and if made a party without any allegation in the complaint contesting his title, he has a right to assume that the proceeding is to be conducted upon the theory that his lien is paramount to that of the plaintiff.

THOSE CLAIMING TITLE ADVERSELY TO MORTGAGOR, OR PRIOR TO MORTGAGE WHICH IS FORECLOSED, even though made parties, are not divested of such adverse or prior rights, by the ordinary clause in foreclosure judgments, barring the defendants and those claiming under them of all right and equity of redemption in the premises. But this clause is held to relate only to such interests as are claimed subsequent and subject to the mortgage which is being foreclosed.

RIGHTS OF FIRST MORTGAGEE, AND OF HIS ASSIGNEE, AT FORECLOSURE SALE UNDER SECOND MORTGAGE.—The second mortgagee foreclosed, making the first mortgagee a defendant under the general allegation only “that he had or claimed some interest in the mortgaged premises.” Judgment was rendered containing the usual clause barring the defendants of all their rights, etc. The second mortgagee bought the mortgaged premises at the foreclosure sale, and received the sheriff’s deed therefor. The first mortgagee, prior to the bringing of the foreclosure suit, had assigned his mortgage, but the assignment was never recorded, and the second mortgagee had no notice of it at the time of the foreclosure sale, but he did have notice, both actual and constructive, that the first mortgage existed, and was notified by the mortgagor himself that it had not been paid. *Held*, that the rights of the first mortgagee, had he continued to hold his mortgage, would not have been cut off by the foreclosure and sale, and that consequently the rights of his assignee were not thereby cut off.

ACTION to foreclose a mortgage. A statement of facts is presented in the opinion. Judgment for the plaintiff against all the defendants, from which the defendant Downer appealed.

Joshua La Due, for the appellant.

Frisby and Mann, for the respondent.

By Court, PAINE, J. The material facts of this case are as follows: Matthias Thullen and wife executed to Louis Weimar, the mortgage to foreclose which this suit is brought, on the twenty-second day of July, 1855, and it was recorded on the twenty-sixth of the same month. Afterwards, in March, 1856, they executed a second mortgage upon the same premises, to Moses Weil, which was duly recorded, and was afterwards assigned to Downer, the appellant. The first mortgage was assigned to the plaintiff, but the assignment was never recorded. It seems that when Downer took the assignment of the second mortgage, he supposed there was no prior incumbrance on the premises, but he afterwards learned of the existence of the first, and he then commenced a suit to foreclose his own mortgage, making Louis Weimar, the first mortgagee, a party, not knowing of the assignment of that mortgage to the plaintiff. Weimar did not appear, and a judgment of foreclosure and sale was entered, with the usual clause barring the defendants and those claiming under them of all right, title, interest, and equity of redemption, etc. A sale took place, at which Downer was the purchaser. He also testified that at the time he purchased, he supposed, upon the authority of some information he had received, that the first mortgage had been paid. He now relies on these facts as a bar to this action, which is brought by the plaintiff as assignee to foreclose the first mortgage. It seems to us very clear that unless the decree and sale in the suit upon the second mortgage had the effect of absolutely cutting off all rights under the first, there is nothing else appearing in the case which should have that effect. The fact that Downer may have supposed that the first mortgage was paid, whatever influence it might have had on an application by him to be relieved from his purchase, could certainly have no influence upon the rights of the owner of that mortgage. It was duly recorded, which was notice to all the world of its existence. Besides this, Downer had actual notice of it, and was notified by the mortgagor himself that it had not been paid. If after this he chose to rely on the information of others that it had been paid, he must be held to have done it at his peril. It ought not to have the slightest effect upon the rights of the holders of that mortgage. The case turns, then, entirely upon the effect of the decree and sale.

And this might present two questions: 1. What would have been the effect upon the rights of Weimar, the first mortgagee, who was made a party to the suit, provided he had still owned the mortgage? and 2. If his rights would have been cut off, would the plaintiff, as assignee, but whose assignment had not been recorded, and of which the purchaser had no notice, stand in any better position?

The conclusion to which we have come upon the first question makes it unnecessary for us to determine the second. Though if the first should be answered in the affirmative, and it should be held that Weimar's rights would, in such case, have been cut off, and vested in the purchaser, there is much reason for holding that under our registry laws, which make an assignee of a mortgage a purchaser, an unrecorded assignment from Weimar could not be set up afterwards against the purchaser's title. Suppose Downer had purchased from the mortgagor, and Weimar had released the first mortgage, Downer having no notice of its assignment, would he not then be entitled to protection, as a *bona fide* purchaser, under the registry laws? And if so, would he not be equally entitled to it if he purchased under a judicial proceeding against Weimar, which was as competent to divest his interest as a release executed by him? These questions have suggested themselves in our consideration of this case, but as we do not find it necessary to determine them, we shall express no opinion in regard to them. The case of *Wilson v. Kimball*, 27 N. H. 300, is a very strong authority in favor of the rights of such an assignee. But whether that conclusion could be sustained under our registry laws, is a matter worthy of serious consideration.

But we are of the opinion that the rights of Weimar would not have been divested by the foreclosure and sale, even if he had still held the first mortgage. His mortgage was a prior incumbrance to the one being foreclosed, and of course the right under it was paramount, both to the rights of the mortgagor and to those of the owner of the second mortgage. As such, he was not a necessary party to the foreclosure suit on the second. And if made a party, without any allegation contesting his title, he had a right to assume that the proceeding was to be conducted upon the theory that his claim was paramount, and therefore not subject to it.

It seems to be established by the authorities that those claiming title adverse to the mortgagor, or prior to the mort-

gage which is foreclosed, even though made parties, are not divested of such adverse or prior rights by the ordinary clause in foreclosure judgments, barring the defendants and those claiming under them of all right and equity of redemption in the premises. That clause is held to relate only to such interests as are claimed subsequent and subject to the mortgage which is being foreclosed. This question is fully considered in *Lewis v. Smith*, 9 N. Y. 502 [61 Am. Dec. 706]. And it was there held that a widow was not divested of her right of dower by a mortgage foreclosure to which she was made a party, under the general allegation that she had claimed some interest in the premises, subsequent to the mortgage, "or otherwise." We can see no reason for a distinction between that case and the present. The fact that here the claim is of a prior mortgage instead of a dower right ought not to create one. Both rights are equally paramount to the rights of the mortgagor and of the second mortgagee. Possibly the validity of either claim might be litigated in a foreclosure suit. The court in that case state that their decision does not extend to a case where one claiming a prior right is made a party in such a manner as to put that right in issue, and answers and litigates it. But as in that case there was nothing in the complaint assailing or questioning in any manner the dower right, so here there is nothing impeaching the validity or priority of the first mortgage. What was the first mortgagee called on to defend against? It was stated in the complaint that he claimed an interest, and there was no allegation against its validity which called on him to defend. He had a right to assume that, without answering, his rights were not to be affected by the proceeding. This conclusion is fully sustained by the case of *Williamson v. Probasco*, 8 N. J. Eq. 571. Assuming here that Weimar still owned the first mortgage, that case is in every respect like this, with one exception. The first mortgagee was there made a party, and his mortgage and its priority were expressly stated in the complaint. The decree, however, as in this case, barred all the parties of all right, etc., in the premises. But it was held that this had no effect upon the rights of the first mortgagee.

The fact that there the priority of the first mortgage was expressly stated in the complaint, does not vary the principle. It only makes its application a little clearer. But there was really nothing more in this complaint tending to impeach, or put in issue, the prior right of the first mortgagee than there

was in that. Indeed, it is fairly implied from the face of the complaint, that the interest claimed by Weimar was prior and paramount to the second mortgage. A printed blank was used, and after stating that Weimar claimed an interest, the usual clause, that such interest accrued subsequent to the mortgage sought to be foreclosed, is erased. From this it may fairly be assumed that the interest claimed by him was prior to that mortgage. And certainly it is not alleged to be subsequent. And the general form of referring to the interests of other incumbrancers, which was here adopted, was allowable only with respect to interests accruing subsequent to the mortgage. Rule 83 of the old chancery rules was like the New York rule on that subject, referred to in *Lewis v. Smith*, 9 N. Y. 502 [61 Am. Dec. 706]. And when the allegation that the interest claimed by Weimar was subsequent to the mortgage was stricken out, it took the case out of the rule allowing that mode of pleading, and required the plaintiff, if he wished to question the right of a prior mortgagee, to make suitable allegations to put it in issue. It would then fall exactly within the following language of Justice Denio, in *Lewis v. Smith*, *supra*: "In the special case of a title to mortgaged premises, and a *bona fide* controversy as to priority between it and the mortgage, the complainant in the foreclosure bill must state the facts upon which the question arises, as he insists they exist, according to the rules of equity pleading which prevailed antecedently to the rule referred to. If he omit to do this, it will be under the pain of being obliged to show, when the decree is relied on collaterally, that the title alleged to be foreclosed was, in fact, subordinate to the mortgage."

We think, therefore, that the rights under the first mortgage would not have been cut off, even though Weimar had owned it at the time of the foreclosure of the second. And of course the rights of the plaintiff were not affected.

The judgment is affirmed, with costs.

ASSIGNEE OF MORTGAGE IS NOT BOUND TO REGISTER ASSIGNMENT: *Mott v. Clark*, 49 Am. Dec. 566, and note 572; *Pratt v. Bank of Bennington*, 33 Id. 201. The failure of such assignee to record his assignment does not postpone the lien of his mortgage to that of a mortgage made by the assignor after the date of the assignment and quitclaim, even though the subsequent mortgagee have no notice of the assignment: See case last cited. See note to *James v. Morey*, 14 Id. 513, as to notice and record of assignment of mortgage.

UNRECORDED INSTRUMENTS ARE VALID AGAINST ALL PERSONS HAVING ACTUAL NOTICE THEREOF: *Newman v. Chapman*, 14 Am. Dec. 766.

ASSIGNEE OF MORTGAGE IS PUT IN MORTGAGEE'S PLACE to all intents and purposes, unless a different intention is apparent from the contract: *Hills v. Eliot*, 7 Am. Dec. 26.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: It is a well-settled rule that the object of a foreclosure suit is to bar the mortgagor, and those claiming subsequent to the mortgage, and not to try the title alleged to be paramount to that of the mortgagor. An adverse or prior right of this kind cannot be controverted in such an action: *Hekla Fire Ins. Co. v. Morrison*, 56 Wis. 136; *Whitney v. Robinson*, 53 Id. 314; *Roberts v. Wood*, 38 Id. 68; *Pelton v. Farmin*, 18 Id. 228. And the principal case was distinguished on this ground in *Roche v. Knight*, 21 Id. 326; *Wicks v. Lake*, Id. 413, 414. In the case last cited, however, it was said that while a foreclosure suit may not be an appropriate proceeding in which to settle the rights of a party claiming to own the mortgaged premises in hostility to the mortgagor, it ought not to be used to deprive a person of the possession of his own land, which another has attempted to mortgage, acting under some mistake as to the true state of the title. While a judgment in a foreclosure suit may well be held to bar and cut off the claims of all parties defendant, whose rights in the mortgaged premises accrued subsequently to the mortgage there foreclosed, it can have no wider application, and cannot bar and cut off their rights under a mortgage prior and paramount to that mortgage: *Straight v. Harris*, 14 Id. 513. The principal case was cited and commented upon in *Board of Supervisors v. Mineral Point R. R. Co.*, 24 Id. 119, 121.

EFFECT OF FORECLOSURE AS TO FIRST MORTGAGEE WHERE MORTGAGE FORECLOSED IS SUBSEQUENT TO HIS.—1. Prior Mortgagees and Lienors are neither Necessary nor Proper Parties.—The following are well-established legal propositions, viz.: that parties having a title paramount to the mortgage foreclosed are neither proper nor necessary parties; that adverse claimants in a foreclosure suit are neither necessary nor proper parties; and that subsequent mortgagees or incumbrancers claiming priority of liens are proper defendants in a foreclosure suit for litigating that issue; and have a close relation to the subject under consideration, but are not included in the following discussion. It is a general rule, and in conformity with the principal case, that persons holding mortgages or liens prior to the mortgage under foreclosure are neither necessary nor proper parties to the action; because the only proper object of the proceedings is to bar all rights subsequent to the mortgage; and the decree can have no effect upon the rights of parties having priority, whether they are made parties to the action or not: *Jerome v. McCarter*, 94 U. S. 734; *Hagan v. Walker*, 14 How. 29; *Pattison v. Shaw*, 6 Ind. 377; *Forrer v. Klock*, 10 Neb. 373; *Tome v. Merchants' etc. Loan Co.*, 34 Md. 12; *Wood v. Beebe*, 21 Vt. 495; *Warren v. Burton*, 9 Rich. 197; *Hudnit v. Nash*, 16 N. J. Eq. 550; *Dawson v. Danbury Bank*, 15 Mich. 489; *White v. Holman*, 32 Ark. 753; *Broward v. Hoeg*, 15 Fla. 370; *Adams v. McPartlin*, 11 Abb. N. C. 369; *Hamlin v. McCahill*, 1 Clarke Ch. 249; *Western Ins. Co. v. Eagle Fire Ins. Co.*, 1 Paige, 284; *Emigrant Industrial Savings Bank v. Goldman*, 75 N. Y. 127; *Smith v. Roberts*, 62 How. Pr. 196, affirmed in 91 N. Y. 470; *Holcomb v. Holcomb*, 2 Barb. 20; *Payn v. Grant*, 23 Hun, 134; *Brown v. Volkening*, 64 N. Y. 76; *Vanderkemp v. Shelton*, 11 Paige, 28; *Hancock v. Hancock*, 22 N. Y. 568; *Eagle Fire Co. v. Lent*, 6 Paige, 635; *Lewis v. Smith*, 9 N. Y. 502, affirming 11 Barb. 152; *Bank of Orleans v. Flagg*, 3 Barb. Ch. 316; *Chapman v. West*, 17 N. Y. 125; *Frost v. Koon*, 30 Id. 428; *Koch v. Purcell*, 13 Jones & S. 162; *Hotchkiss v. Clifton Air Cure*, 4 Keyes, 170; *Wurcler v. Hewitt*, 10 Mich. 453; *Bogey v. Skute*, 4 Jones Eq. 174; *Murphy v.*

Farwell, 9 Wis. 102; *Krutsinger v. Brown*, 72 Ind. 466; *Wright v. Bundy*, 11 Id. 398; *Summers v. Bromley*, 28 Mich. 125; *Comstock v. Comstock*, 24 Id. 39; *Young v. Montgomery etc. R. R. Co.*, 3 Am. L. T. R., N. S., 91; *Hall v. Hall*, 11 Tex. 526; *Post v. Mackall*, 3 Bland Ch. 486; *Hoppock's Ex'rs v. Ramsey*, 28 N. J. Eq. 414; *Wakeman v. Grover*, 4 Paige, 23; *Kay v. Whittaker*, 44 N. Y. 565; *Merchants' Bank v. Thompson*, 55 Id. 7; *Rathbone v. Hooney*, 58 Id. 463; *Brundage v. Domestic etc. Society*, 60 Barb. 204; *Walker v. Jarvis*, 16 Wis. 28; *Macloon v. Smith*, 49 Id. 200; *Ross v. Page*, 2 Sim. 471; *Blackburn v. Jepson*, 3 Swanst. 151; *Delabere v. Norwood*, Id. 144; *Richards v. Cooper*, 5 Beav. 304. But for cases contrary to such authority, see *Case v. Bartholow*, 21 Kan. 300; *Morris v. Wheeler*, 45 N. Y. 708, seems to be in conflict with the cases cited above, but it is not really so. In Iowa, junior and senior mortgagees are held to be proper parties to a bill for foreclosure, but not necessary parties to such a proceeding: *Heimstreet v. Winnie*, 10 Iowa, 430; *Standish v. Dow*, 21 Id. 365. A decree of sale can generally have no effect upon the rights of prior lienors, whether they are made parties to the action or not: See cases cited to first point, *supra*; *Smith v. Roberts*, 91 N. Y. 470. A foreclosure is an equitable action *in rem* designed to extinguish the mortgage and to cut off all liens which are subsequent to it upon the premises, and not in any way to affect the title to the premises, or the liens upon it prior to the execution of the mortgage: *Wiltzie on Mortgage Foreclosures*, sec. 116. Where a junior mortgagee had commenced an action to foreclose, and the senior mortgagee afterwards commenced a foreclosure, making the junior mortgagee a defendant, who answered that an action was pending for the foreclosure of the junior mortgage, to which the senior mortgagee had been made a defendant, and asked the foreclosure of the prior mortgage as well as the foreclosure of his own, the court held that the fact that the senior mortgagee was made a defendant to the foreclosure of the junior mortgage did not affect his rights, and that he might disregard the foreclosure of the junior mortgage and prosecute his own foreclosure to a sale: *Adams v. McPartlin*, 11 Abb. N. C. 369; compare principal case and *Straight v. Harris*, 14 Wis. 509, on this point. When a subsequent mortgagee makes a prior mortgagee a party to a foreclosure suit, as well as the owner of the equity, his proceeding, so far as the former is concerned, becomes a bill to redeem, and not to foreclose: *Hudnit v. Nash*, 16 N. J. Eq. 550. The prior mortgage stands unaffected by the proceeding, although the holder of it suffers default: *Straight v. Harris*, 14 Wis. 509; *Dawson v. Danbury Bank*, 15 Mich. 509; and may be foreclosed against one who purchases at the foreclosure sale under the junior mortgage: *Williamson v. Probasco*, 8 N. J. Eq. 571. A prior judgment lien, *Frost v. Koon*, 30 N. Y. 428, or a mechanic's lien, *Emigrant Industrial Savings Bank v. Goldman*, 75 Id. 127, stands unaffected in the same way, although the creditor was made a party to the suit to foreclose a junior mortgage. On the same principle, in a suit to foreclose a mortgage made of a title bond, the vendor is not a proper party. He cannot be affected by the decree: *Pridgen v. Andrews*, 7 Tex. 461. A prior mortgagee cannot properly be made a party to a bill to enforce a mechanic's lien; and if made a party and a decree be taken against him by default, it will be set aside: *Smith v. Shaffer*, 46 Md. 573. That a prior lienor cannot properly be made a defendant to an action to foreclose or enforce a mechanic's lien, see also *Emigrant Industrial Savings Bank v. Goldman*, 75 N. Y. 127. If a prior mortgagee, who has been made a defendant to the foreclosure of a junior mortgage, dies or his interest devolves on another pending the action, the proceedings may go on without reviving or continuing it against his personal representatives or suc-

cessor, as he was not a necessary party to the foreclosure: *Hancock v. Hancock*, 22 Id. 568.

2. *Prior Lienors can Properly be Made Defendants when.—Practice of Courts in Such Cases.*—A prior lienor by judgment, mortgage, or otherwise, may be made a defendant to the foreclosure of a junior mortgage for the purpose of having the amount of his claim ascertained and paid out of the proceeds of the sale, but such a purpose must be specifically indicated, and the prior claim set forth in full in the complaint: *Emigrant Industrial Savings Bank v. Goldman*, 75 N. Y. 127; *Smith v. Roberts*, 91 Id. 470; *Holcomb v. Holcomb*, 2 Barb. 20; *Vanderkemp v. Shelton*, 11 Paige, 28. But even in such a case, the prior lienor cannot be compelled to accept payment from the proceeds of the sale, unless his lien has matured and is due and payable: *Western Ins. Co. v. Eagle Fire Ins. Co.*, 1 Id. 284; *Western Reserve Bank v. Potter*, Clarke Ch. 439; *Frost v. Yonkers Savings Bank*, 70 N. Y. 553; S. C., 26 Am. Rep. 627. Compare *Hamlin v. McCahill*, Clarke Ch. 249. And a court will not, then, ordinarily decree the payment of a prior lien from the proceeds of the sale, unless the prior lienor has appeared and consented to the decree. He must be willing to receive payment, and for the purpose of making a sale of the whole title. He is not a necessary party, except for such a decree: *Jerome v. McCarter*, 94 U. S. 734; *Warner v. De Witt Co. Nat. Bank*, 4 Bradw. 305; *Norton v. Joy*, 6 Id. 406; *Roll v. Smalley*, 6 N. J. Eq. 464; *White v. Holman*, 32 Ark. 753; *Raymond v. Holborn*, 23 Wis. 57; *Persons v. Alsip*, 2 Ind. 67; *Troth v. Hunt*, 8 Blackf. 580; *Evans v. McLucas*, 12 S. C. 56; *Waters v. Bossel*, 58 Miss. 602; *Hudnit v. Nash*, 16 N. J. Eq. 550; *Tootle v. White*, 4 Neb. 401; *Emigrant Industrial Savings Bank v. Goldman*, 75 N. Y. 127; *contra: Clark v. Prentice*, 3 Dana, 469; *Champlin v. Foster*, 7 B. Mon. 104. Compare *Gargan v. Grimes*, 47 Iowa, 180; *Anonymous*, 8 N. J. Eq. 174. In *Finley v. Bank of United States*, 11 Wheat. 306, Chief Justice Marshall seems to hold that the prior mortgagee is a necessary party; but in *Hagan v. Walker*, 14 How. 37, this is explained by Judge Curtis. As to what allegations must be made in the complaint, see *Dunn v. Raley*, 58 Mo. 134. If the prior mortgagee consents to a sale, he cannot afterward commence a foreclosure of his own mortgage: *Rowley v. Williams*, 5 Wis. 151. The court may order a sale, subject to a prior incumbrance; and unless the mortgagee with paramount title expressly consents to a sale of the mortgaged estate, the sale must be made subject to his mortgage: *Langton v. Langton*, 7 De G. M. & G. 30; and no portion of the proceeds of the sale can be applied in payment thereof: *Bache v. Doscher*, 67 N. Y. 429; *Emigrant Industrial Savings Bank v. Goldman*, 75 Id. 127; S. C., 19 Alb. L. J. 159. As we have seen, prior mortgagees are, in some cases, made parties to a bill of foreclosure by the junior mortgagee, so that the court may, with their consent, order a sale of the whole estate, and thus make a good and complete title in the purchaser: *Champlin v. Foster*, 7 B. Mon. 104; *Clark v. Prentice*, 3 Dana, 468; and in Kentucky it is held that the interest of the mortgagor and of the mortgagee, as well as the security of purchasers, renders this the proper course, because if each of several successive mortgagees could have a decree and sale, there would be no confidence in judicial sales: See cases last cited; and *Persons v. Alsip*, 2 Ind. 67; *Troth v. Hunt*, 8 Blackf. 580; *Warren v. Burton*, 9 S. C. 197; *Evans v. McLucas*, 12 Id. 56; *Waters v. Bossel*, 58 Miss. 602. A prior mortgagee, as stated above, is sometimes made a party to a foreclosure suit by a junior mortgagee, with a view to his assenting to a decree for the sale of the whole estate, in which case his mortgage is first paid, and the proceeds then applied to the second mortgage: *Vanderkemp v. Shelton*, 11 Paige, 28; *Ducker v. Belt*, 3 Md. Ch. 13; *Rucks v. Taylor*, 49 Min.

552; *Miller v. Finn*, 1 Neb. 254. In such case, the legal presumption is, that a purchaser at a foreclosure sale gives the full value of the property; and the whole proceeds of the property are then applied to the payment of the incumbrances in the order of their priorities: *Vanderkemp v. Shelton*, 11 Paige, 28; *Buell v. Farwell*, 8 Neb. 224. But a prior mortgagee should not be made a party to the suit unless he previously indicates a willingness to have the whole title sold under the foreclosure, and to have all incumbrances paid out of the proceeds in the order of their priority: *Vanderkemp v. Shelton*, 11 Paige, 28; *Ducker v. Belt*, 3 Md. Ch. 13; *Rucks v. Taylor*, 49 Miss. 552; *Miller v. Finn*, 1 Neb. 254; *Champlin v. Foster*, 7 B. Mon. 104; *Clarke v. Prentice*, 3 Dana, 469. In England, the practice upon a sale under a subsequent mortgage is to make the mortgagee with paramount title a party to the suit, if it is desired to sell the whole estate, when he is required to consent to such sale, or to refuse it at once; and then if he concurs, a sale of the whole estate is decreed; otherwise the decree is for a sale subject to his security: *Wickenden v. Rayson*, 6 De G. M. & G. 210; *Langton v. Langton*, 7 Id. 30; *Delabere v. Norwood*, 3 Swanst. 144; *Parker v. Fuller*, 1 Russ. & M. 656; and in proper cases the English rule concerning prior mortgages is followed in the courts of this country: *Bigelow v. Cassedy*, 26 N. J. Eq. 557; *Potts v. N. J. Arms Co.*, 17 Id. 518; *Gihon v. Belleville W. L. Co.*, 7 Id. 531; *Jerome v. McCarter*, 94 U. S. 736; *Perdicaris v. Wheeler*, 8 N. J. Eq. 68; *Person v. Merrick*, 5 Wis. 231. But in Indiana, contrary to the practice in nearly all other states, a prior incumbrancer is held to be a proper party to the foreclosure of a senior mortgage, and when made a party will be bound by the decree: *Masters v. Templeton*, 92 Ind. 447; *Merritt v. Wells*, 18 Id. 171. When one is made a party to a foreclosure suit, as the holder of a subsequent mortgage, and such party is also the owner of mortgages prior to that of the plaintiff, he may answer in the action, and ask to have such prior mortgages paid out of the proceeds of sale before applying any portion thereof to the satisfaction of the plaintiff's mortgage: *Doctor v. Smith*, 16 Hun, 245. It is the usual practice in New York, where prior incumbrancers are improperly made parties to a foreclosure, to order the action to be dismissed as to such defendants, upon their application, without prejudice to their rights, or the plaintiff's, in any other proceeding: *Corning v. Smith*, 6 N. Y. 82; *Banning v. Bradford*, 21 Minn. 308; S. C., 18 Am. Rep. 398. If the action is not dismissed as to them, their rights may be expressly reserved in the decree: *San Francisco v. Lawton*, 18 Cal. 465; S. C., 79 Am. Dec. 187; *Wilkinson v. Daniels*, 1 Greene, 179; or they may disregard the action, as the decree can have no effect whatever upon their rights: See cases first cited in this note, *supra*. If a sale of the entire property be decreed in a suit to which the senior mortgagee is not a party, he may enjoin the execution of the decree: *Rucks v. Taylor*, 49 Miss. 522; though in such case the decree would be void so far as it might affect his rights. With the consent of the prior mortgagee, who has brought a foreclosure suit, a subsequent mortgagee may file a cross-bill for the foreclosure of his mortgage, and the mortgagor cannot object, for it works no injury to him: *Crocker v. Lowenthal*, 83 Ill. 579.

HASBROUCK v. CITY OF MILWAUKEE.

[13 WISCONSIN, 57.]

POWER OF MUNICIPAL CORPORATION TO ENGAGE IN WORKS OF INTERNAL IMPROVEMENT, such as building railroads, canals, harbors, etc., has been sustained on the ground that such works are matters of public concern, for which the taxing power might lawfully be called into action.

MUNICIPAL CORPORATION CANNOT LAWFULLY ENGAGE IN WORKS OF PUBLIC IMPROVEMENT unless empowered by legislative authority to do so.

CONTRACT OF MUNICIPAL CORPORATION, VOID FOR WANT OF CAPACITY IN EITHER PARTY to make it, cannot be given life and vitality by the legislature against the wishes of either of the parties to it.

SUBSEQUENT RATIFICATION OF VOID CONTRACT BY PARTIES TO BE BOUND, coupled with their power to assent to the contract, will render it obligatory.

AUTHORITY TO ISSUE MUNICIPAL BONDS TO AMOUNT OF TEN THOUSAND DOLLARS for constructing a harbor does not authorize municipality to construct a harbor at a greater expense, and a contract for such purpose, providing for a greater expenditure, is void as to the excess.

In 1853, the mayor and common council of the city of Milwaukee were authorized by the legislature to issue bonds to an amount not exceeding fifty thousand dollars to raise money to be expended in the construction of a harbor. The act provided, however, that before issuing any bonds the assent of the legal voters should be had at an election for that purpose. In 1856, the act was amended, making the sum one hundred thousand dollars instead of fifty thousand dollars. In 1857, another act was passed, authorizing the mayor and common council "to issue such an amount of bonds of said city as may be necessary to complete the harbor." The city entered into a contract for the construction of the harbor with one Hawley. Several changes of plan and agreement occurred, and various assignments of the contract took place, with the consent of the city, until the contract fell into plaintiff's hands. Plaintiff completed the work, and claimed under the contract one hundred and seventy-seven thousand three hundred and eighty-four dollars and thirty-eight cents, on which he had received one hundred and three thousand seven hundred and seven dollars and fifty-three cents, leaving a balance due of seventy-three thousand seven hundred and seventy-six dollars and eighty-three cents. The city refused to pay this balance, and plaintiff brought suit, setting up these facts. Defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The circuit court sustained the demurrer, and gave judgment for defendant. Plaintiff appealed.

Emmons, Van Dyke, and Hamilton, for the plaintiff in error
J. La Due, city attorney, and *H. L. Palmer*, for the respondent.

By Court, DIXON, C. J. The power of municipal corporations, when authorized by the legislature, to engage in works of internal improvement, such as the building of railroads, canals, harbors, and the like, or to loan their credit in aid thereof, and to defray the expenses of such improvements, and make good their pledges by an exercise of the power of taxing the persons and property of their citizens, has always been sustained on the ground that such works, although they are in general operated and controlled by private corporations, are nevertheless, by reason of the facilities which they afford for trade, commerce, and intercommunication between different and distant portions of the country, indispensable to the public interests and public functions. It was originally supposed that they would add, and subsequent experience has demonstrated that they have added vastly and almost immeasurably, to the general business, the commercial prosperity, and the pecuniary resources of the inhabitants of the cities, towns, villages, and rural districts through which they pass, and with which they are connected. It is in view of these results, the public good thus produced, and the benefits thus conferred upon the persons and property of all the individuals composing the community, that courts have been able to pronounce them matters of public concern, for the accomplishment of which the taxing power might lawfully be called into action. It is in this sense that they are said to fall so far within the purposes for which municipal corporations are created, that such corporations may engage in or pledge their credit for their construction. Upon no other principle can the exercise of the power of taxation for such objects be sustained. And in doing so the courts have never, to my knowledge, extended it to cases where it was not apparent that the members of the corporation concerned would be benefited by the construction of the work contemplated. The building of the harbor at Milwaukee comes clearly within this principle, and upon it there can be no doubt that, so far as the corporation has acted within the limits of the authority granted by the legislature, it is bound to a strict performance of its contracts. But whilst the power of such corporations, when authorized, thus to engage in or loan their credit for the making of such improvements has been almost invariably upheld, it

has not as yet, I believe, been adjudged in any case that they could do so without such legislative authority. No court or writer upon the subject, so far as I know, has ever claimed or intimated that they could do so in the absence of such authority. On the other hand, the general expression of opinion has been that they are incompetent, by virtue of their ordinary powers, and without such special legislative authority, to contribute to such enterprises. Mr. Pierce, in his treatise on American railroad law, recently put forth, says that no attempt on their part, without such special legislative authority, to exercise such extraordinary powers, has been the subject of judicial examination, and adds his opinion that it could not be sustained. In several cases which have heretofore been before this court, it has been conceded by counsel that it could not be. In this case, the counsel for the plaintiff in error expressly waived its discussion, and virtually admitted that the rights of their client must stand or fall upon the true construction of the several acts of the legislature by which the city was permitted to engage in the work. They rested the case upon the effect to be given to those acts and the action of the city under them. Its decision, therefore, depends upon the construction which they shall receive, and the several steps taken by the city in pursuance of them.

And here it will become more convenient for me to reverse the order of argument pursued at the bar, and of time in which the several acts were passed, and to examine the last position taken by the counsel for the plaintiff in error under the last act first, and in connection with it the authorities by which they seek to support it. It is said by them that if it be conceded that under the two previous statutes the city was only authorized to enter into a contract for the construction of a harbor, the expense of which should not exceed one hundred thousand dollars, and that the municipal authorities were not, at the time they attempted to do so, empowered to make an agreement, or bind the corporation for the payment of a greater sum, the defect is cured by the operation of the act of February 23, 1857 (Private Laws 1857, c. 66), and that from and after the passage of this act, the agreement for the excess became valid and binding upon the city. To this position counsel cite several authorities, and as I am unable to agree with them, an examination of those authorities will become necessary. In the first place, it will be observed from what has already been said, and should be borne in mind, that the sub-

ject with which we are dealing is not one of public policy merely, but of corporate power; and that the inquiry is whether, where the supposed contract of a public corporation is absolutely void for want of capacity to enter into it, a subsequent legislative ratification or recognition of it is sufficient, *proprio vigore*, and without any evidence that such ratification or recognition was procured at the instance or with the assent of the corporation, or that the corporation has subsequently acted upon or confirmed it, to give such contract life and validity, and make it obligatory upon the corporation. Conceding that the previous statutes did not confer upon the city the power to enter into the contract, which I shall discuss hereafter, then I understand such to be the true nature of the inquiry here presented. I do not understand that the city, by any appropriate action, petitioned or asked for the passage of the act; nor is it averred that it subsequently ratified or assented to it. On the contrary, I infer from this proceeding that it has refused to be bound by it, or the contract to which it had reference. Under these circumstances, the question is, Can the legislature, by recognizing the existence of a previously void contract, and authorizing its discharge by the city, or in any other way, coerce the city against its will into a performance of it? or does the law require the assent of the city as well as of the legislature in order to make the obligation binding and efficacious? I must say that, in my opinion, the latter act, as well as the former, is necessary for that purpose, and that without it the obligation cannot be enforced. A contract void for want of capacity in one or both of the contracting parties to enter into it is as no contract; it is as if no attempt at an agreement had ever been made. And to admit that the legislature, of its own choice and against the wishes of either or both of the contracting parties, can give it life and vigor, is to admit that it is within the scope of legislative authority to divest settled rights of property, and to take the property of one individual or corporation and transfer it to another. It is certainly unnecessary at this day to enter into an argument or to cite authorities to show that under a constitutional government like ours the legislature has no such power.

It is undoubtedly true that in cases like the present, where there is a strong moral but no legal obligation to pay, courts often have seized, and may again seize, upon very slight circumstances of assent in order to give effect to the contract. And in this case, if it appeared that the city did by some au-

thorized action procure the passage of the act, or had subsequently acquiesced in it by ratifying the contract, there would be little difficulty in the way of holding it bound by its terms. In such cases, it is the contemporaneous or subsequent assent of the parties to be bound, coupled with the power or ability on their part to give such assent, which makes the contract obligatory. But the giving of such assent is a matter which depends upon their own free will. It is a voluntary act which they may do or not do as they see fit, and in case they think proper to withhold it, the legislature has no power to compel it. If in a transaction between private parties, a contract made by them should be declared void by the provisions of some statute, as, for instance, a statute against usury, no one, I think, would insist that the legislature could, without the consent of the borrower, remove the infirmity, and make the agreement obligatory upon him. It might change the entire policy of the state upon the subject of interest, and declare that no rate, however exorbitant, should avoid the security, but it could not, without the assent of the parties, interfere with past transactions. Corporations, whether public or private, are within the same rule of protection, and I can see no substantial ground for a distinction between contracts which are void for a want of capacity in one or both of the contracting parties to enter into them and those which are void for some other cause. If the city in this instance had accepted and approved the act of the legislature, in whole or in part, there can be little doubt that to the extent of such acceptance and approval it would have become bound. The case would then have fallen within the principles of the case of the *City of Bridgeport v. Housatonic R. R. Co.*, 15 Conn. 475, where the bonds of the city issued to aid in the construction of the company's road were held valid, because the confirmatory resolution of the general assembly was afterwards accepted by the freemen of the city. It would also come within the doctrine of this court laid down in the recent case of *Mills v. Gleason*; but until there be such acceptance, I know of no authority for saying that the city is bound.

The mistake of the counsel for the plaintiff in error consists in their supposing it to be a mere question of public policy. If it were, and the court were only called upon to determine what was the policy of the state with reference to allowing municipal corporations in general, and the corporation of Milwaukee in particular, to engage in works of that kind at the

time the contract was enlarged, then I would admit that their position is supported by the cases of *Shaw v. Norfolk County R. R. Co.*, 5 Gray, 162, and *Hall v. Sullivan R. R. Co.*, 1 Brun. Col. Cas. 613, U. S. Cir. Ct. for district of New Hampshire; also reported in *Pierce on American Railroads*, p. 520, note 1. In both these cases, the question arises whether the instruments by which the railroad corporation had attempted to transfer their franchises were invalid, upon grounds of public policy. It was insisted that, as the franchises were created by the legislature for the public benefit, and confided to particular political persons to be exercised for that purpose, any attempt to delegate them to others was inoperative and void. In both instances, the legislatures of the respective states had, by acts passed after the execution of the conveyances, referred to and recognized them as valid. In the first-named case, the conveyance had been directly ratified and confirmed by statute. The courts held that such acts of recognition were conclusive upon their effect, because they showed that at the time they were executed no rule of public policy was contravened. They acknowledged the power of the legislature to determine and control the policy of the state with regard to corporations created under its authority, and looked into the acts as evidence of what that policy was when the transfers were made. No question of corporate power was made. The policy being settled in favor of the transfers, the power to make them was conceded. But such is not the nature of the transaction before us. This is not a question of conceded power and doubtful policy at the time the plan was changed and the contract enlarged, but the reverse. We cannot, from an examination of the statute under consideration, say, as the courts there said, that it was originally the intention of the legislature that the corporation should possess the power which it has attempted to exercise. We cannot infer from it that the legislature intended at the outset that the people or corporate authorities of Milwaukee should have the power to expand the undertaking and augment its expense at their pleasure, but rather the contrary. The more natural and truthful inference is, that, in the opinion of the legislature, they had not such power, and hence the passage of the act for the purpose of enabling the city, if it chose, to do that which, under the circumstances, the legislature deemed to be equitable and just. The language of the act is permissive, and not compulsory. It indicates no desire on the part of the legislature, even if it possessed the power,

to compel the city to issue its bonds for the completion of the harbor. The legislature simply say that the mayor and common council are authorized and empowered to issue such an amount of bonds as may be necessary to complete it, in such denominations as they may deem proper, and bearing interest at a rate not exceeding seven per cent.

It furthermore sufficiently appears in both the above-named cases that the railroad companies had acted under and ratified the confirmatory statutes. In the first, it is distinctly stated that the company had paid a portion of the interest which had accrued upon the bonds, for the security of which the mortgage was executed, after the passage of the statute; and in the second, although there is no separate statement of the facts, and we have only such as are to be gathered from the opinion of the court, which does not profess to give them completely and accurately, still I think it is fairly to be inferred from what is said that the company had acted under the first statute and issued new stock in pursuance of the authority there given. So that if any doubts had arisen in those cases as to the power of the companies to mortgage their franchises, there was such evidence of their subsequent assent as would have cured the defect, and they would then have been no guide for the determination of this case.

It follows from what I have already said, that, in my opinion, this is not a defect which can be reached by the retroactive power of the legislature alone. It cannot, because in so doing the legislature would interfere with vested rights of property. It would of its own mere motion create an obligation where, by law, none before existed; it would impose a liability against the will and without the consent of the party to be charged. This the legislature cannot do. It can only act retrospectively for the purpose of furnishing a remedy for or removing an impediment in the way of the enforcement of some pre-existing legal or equitable right or duty, and not for the purpose of creating such right or duty. And the distinction, I think, will be found to prevail in all the cases. An examination of them will, I believe, show that such legislation has not been permitted to conclude the rights of the parties, except when legal or equitable rights or obligations had grown up out of the previous lawful acts and dealings of the parties, and existed independently of the defect or irregularity complained of, and which the legislature sought to cure or remove; and that no case can be found where it has been held that such legis-

lative action alone was sufficient to give life and validity to supposed contracts or obligations which originated solely and exclusively in acts which it was unlawful or impossible for the parties themselves at the time to perform. Chancellor Kent, in the first volume of his Commentaries, page 455 of the original edition, in speaking of the retroactive power of the legislature in this country, sums up the doctrine very clearly and accurately. He says: "A retrospective statute affecting and changing vested rights is very generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void. But this doctrine is not understood to apply to remedial statutes which may be of a retrospective nature, provided they do not impair contracts or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy, by curing defects and adding to the means of enforcing existing obligations. Such statutes have been held valid when clearly just and reasonable, and conducive to the general welfare, even though they might operate in a degree upon existing rights as a statute to confirm former marriages defectively celebrated, or a sale of lands defectively made or acknowledged. The legal rights affected in those cases by the statutes were deemed to have vested subject to the equity existing against them, and which the statutes recognized and enforced. But the cases cannot be extended beyond the circumstances on which they repose, without putting in jeopardy the energy and safety of the general principle." In this case, it is impossible to say that, by virtue of the supposed contract, the plaintiff did or could obtain any vested rights as against the city, beyond the one hundred thousand dollars which it was previously authorized to expend in the building of the harbor, for the reason that it was not in the power of the people or the corporate authorities, by any action which they could take, to lay the foundation for such rights. If the city had possessed the general authority to build the harbor without regard to the expense, but had failed through some technical error or mistake to exercise that authority in the manner prescribed by law, the case might then have fallen within the remedial power of the legislature; but now it does not, unless the city assents to it.

The authorities cited by the counsel for the plaintiff in error, and which may be supposed to be the strongest that can be found in support of their position, will sufficiently illustrate this rule. In *Wilkinson v. Leland*, 2 Pet. 627, the executrix

appointed under a will which had been admitted to probate in the state of New Hampshire, under an order of the probate court of that state, sold and conveyed some real estate which had belonged to the testator, situated in the state of Rhode Island, for the payment of debts. The estate of the testator was represented to be insolvent, and was in fact nearly so, there being only some fifteen pounds left for distribution after appropriating the proceeds of all his effects, including the price of the land in question, to the payment of the debts due from him, and deducting the expense of administration. It was conceded that the probate court of New Hampshire had no power to direct the sale of lands in another state, and that the sale and conveyance were consequently inoperative and void. The legislature of Rhode Island subsequently, on the petition of the executrix, ratified and confirmed the deed. The funds realized were applied by her in discharge of the demands of the creditors. There was no pretense that the sale was unfair, or that any part of the transaction was characterized by fraud or bad faith. The supreme court held that the act of ratification rendered the conveyance operative and effectual. In doing so, the court made the decision turn mainly upon the fact that by the laws of Rhode Island, as of all the New England states, the real estate of testators and intestates stands chargeable with the payment of their debts, upon a deficiency of assets of personal estate, and although at law the title is said to vest in the heir or devisee immediately on the death of the ancestor or testator, yet it does so only conditionally and subject to the liens or claims of creditors, for the satisfaction of which it is liable to be divested and sold. It is only the interest which is left after payment of the debts that goes to the heir or devisee. The court considered the estate or its proceeds as belonging to the creditors, for whose benefit it was liable in law to be sold and conveyed. Their rights were pre-existing and legal, and the act of confirmation, as well as the sale and conveyance, were purely remedial in their nature; they aided in the enforcement of existing obligations, in giving the creditors what justly already belonged to them. It is very evident from the opinion that if there had been no creditors, and therefore no pre-existing rights, the conclusion of the court must have been quite different. The sale and conveyance, at the time they were made, were not unlawful, improper, or impossible in themselves. The defect consisted only in the manner in which they were made and executed.

The case of *Syracuse City Bank v. Davis*, 16 Barb. 188, is similar in its character. The bank lacked nothing of the substance of a good institution of the kind. It had a sound capital, and had practically performed all the duties which pertained to it, but a mistake had occurred in the form of the proof and acknowledgment of a part of the subscribers to the certificate. The objection was entirely technical in its nature, and did not go to any of the substantial requirements of the law. It was a bank *de facto*, and the act which it had done was not beyond the legitimate scope or powers of such a corporation. It was not the case of a bank attempting to do that which at the time no bank could do. The removal of the obstruction was therefore a remedial act, which aided in the enforcement of a just and equitable obligation to which there was otherwise no legal objection. Possessing all the essential qualities of a perfect institution, and the transaction being lawful, its contract was not a nullity, so that with the aid of the legislature it could not be enforced. It was regarded so far a complete corporation as to have the capacity of acquiring vested rights, though owing to a technical irregularity there was an impediment in the way of applying the remedy, which the legislature proceeded to displace. The act did not profess to create a new corporation, but to remedy the defects in the organization of one which already existed. In the present case, if the statute is to be held to have any beneficial effect whatever, it must be because it gave to the city a power or capacity beyond what it before possessed. For if, as was contended by counsel, it had by the previous acts the authority to enter into a contract for the completion of the entire harbor on the plan last adopted, and without limitation as to price, then the act was nugatory and useless. For then it would have had the power to issue its bonds, or any other evidence of indebtedness, without the assistance of this statute. Such power would have flowed from its ability to contract, and it needed not the action of the legislature to enable it to adjust or settle its liabilities in such form as the municipal authorities saw fit to adopt: See *Mills v. Gleason*, 11 Wis. 470 [78 Am. Dec. 721], *Ketchum v. City of Buffalo*, 14 N. H. 356, and the authorities there cited in the opinion of Wright, J. The statute therefore does not operate in this case as it did in that, remedially. It was there designed to cure a defective exercise of the power to organize a bank, a power which already existed. Here it was not intended to help out the operation of an existing power,

but to confer one which the corporation did not before possess. The distinction is between aiding the imperfect execution of an authority previously granted, or act lawful in itself, and the granting of a new authority or attempting to relieve against an unlawful act.

It requires no effort to distinguish between this case and that of *Foster v. Essex Bank*, 16 Mass. 245 [8 Am. Dec. 135]. There the statute was clearly remedial. It provided, generally, that all corporations then existing, or thereafter to be established, whose powers should expire at a given time, should be continued in existence as bodies corporate for three years after the time limited by their charters, for the purpose of suing and being sued, settling and closing their concerns, and dividing their capital stock; but not for continuing the business for which they were established. It is very evident that the object of the act was to save and continue the remedy upon existing obligations, and not to create new ones. The same reasoning will apply to cases of marriages defectively celebrated; judgments entered on the wrong day: *Underwood v. Lilly*, 10 Serg. & R. 101; deeds defectively acknowledged: *Tate v. Stooltzfoos*, 16 Id. 35 [16 Am. Dec. 546]; or remedies given where by law none before existed: *Hepburn v. Curtis*, 7 Watts, 300 [32 Am. Dec. 760].

I therefore think that this action cannot be maintained, unless, as was contended by counsel, the city had the power to enter into and bind itself by the contract under the provisions of the previous acts. If it had, then it may; for the contract was made and the work completed after their passage, but before the enactment of that which I have been considering.

I have already noticed that if, by the previous acts, authority was delegated to the city to complete the harbor in the manner in which it has been done, then the last act was wholly nugatory and useless. It would be so, except so far as it might be considered as a legislative interpretation of the former acts, and in that respect it would make against the construction contended for by the counsel for the plaintiff in error. It shows most indubitably that in the opinion of the legislature the city was limited by them to an expenditure of one hundred thousand dollars. This I cannot for a moment doubt is the true construction of those acts. It is manifest to me from their entire scope and tenor, and the language used, particularly in the first (Laws of 1853, c. 171), under which the en-

larged power is claimed, that such was the intention of the legislature. Its language is restrictive. The mayor and common council were authorized to issue bonds of the city to an amount not exceeding fifty thousand dollars. The regulations to be observed and steps to be taken before the bonds could be issued clearly indicate it. The assent of a majority of the legal voters was first to be obtained. Before issuing any bonds, the common council were required to submit the question of such loan to the legal voters of the city at an election to be called for that purpose, of which at least ten days' notice was to be given, and at which election the votes should be by ballot, which should have written or printed thereon the words "for the harbor loan," or the words "against the harbor loan;" and if a majority of the votes cast on that subject should be "for the harbor loan," the common council should issue the bonds, but not otherwise. Why were these restrictive words used, and the authority of the mayor and council thus circumscribed, if the legislature intended, by making it their duty "to let out the work by contract to the lowest bidder," to abrogate the limitation and to give them authority to bind the city to any extent they saw fit? Was it not the intention to make the power to contract subservient to the general restriction previously imposed? It seems to me clear that such was the object in view. Such construction is alone in harmony with the rule that we are so to construe statutes as that all may stand and no part be defeated. It is consistent with the latter provision, and gives it the effect which the legislature intended, whilst the opposite construction would frustrate and render inoperative their will as plainly expressed in the former. This interpretation is strengthened by section 3 of article 11 of the constitution, which makes it the duty of the legislature to restrict cities and villages in their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessment and taxation, and in contracting debts by such corporations. In imposing this restriction when the city was about to engage in such an enterprise, the legislature performed a plain constitutional duty. And in doing so, what more unambiguous or less doubtful method could they have adopted than that of fixing the sum which the city might expend? Clearly none. Again, why submit the question to the will of the voters, if such submission was to have the effect of authorizing the municipal authorities to incur an indebtedness many times

larger than that upon which they were called upon to express their opinion? Was it the intention to deceive and trick upon them liabilities and burdens of which they had not the slightest intimation? Evidently the legislature had no such design, but the intention was to allow the city to loan its credit to that amount, provided a majority of the voters gave their consent, otherwise not at all. With a majority vote against the loan, the provision in relation to letting the contracts would have remained a dead letter upon the statute-book.

I need not spend time upon the act of March 18, 1856 (Private Laws of 1856, c. 145). It simply authorized an increase of the amount of the bonds to one hundred thousand dollars. No other effect was claimed for it.

I do not discuss the questions growing out of the alleged irregularities in the reletting or subsequent enlargement of the contract. The city having already exceeded the limits fixed by the two first acts by issuing its bonds to a greater amount than they authorized, and there being no averment in the complaint that it has assented to or ratified the last, those questions become immaterial. In my judgment, the judgment of the circuit court should be affirmed.

Judgment affirmed.

POWER OF MUNICIPAL CORPORATION TO BORROW MONEY.—This subject is discussed at length in *Bank of Chillicothe v. Chillicothe*, 30 Am. Dec. 185, and extended note thereto 190-194.

RATIFICATION OF ILLEGAL CONTRACTS: See *Boutelle v. Melendy*, 49 Am. Dec. 152; *Breckinridge v. Ormsby*, 19 Id. 71; *Newell v. Fisher*, 49 Id. 66; *McCant v. Bee*, 16 Id. 610.

POWERS OF MUNICIPAL CORPORATION ARE LIMITED.—IT CAN ONLY EXERCISE POWERS EXPRESSLY GRANTED, and such others as may be necessary to carry the powers expressly granted into execution: *Collins v. Hatch*, 51 Am. Dec. 465; *Commonwealth v. Erie etc. R. R. Co.*, 67 Id. 471; *Carron v. Martin*, 69 Id. 584, and note 589; *City of St. Paul v. Laidler*, 72 Id. 89; *Abby v. Billeps*, Id. 143.

THE PRINCIPAL CASE WAS CITED in each of the following authorities and to the point stated: Curative statutes, and the principles on which they rest, have been frequently upheld by the supreme court of Wisconsin: *Kimball v. Town of Rosendale*, 42 Wis. 412. But statutes enacted for the purpose of curing defects and irregularities in proceedings for the assessment and collection of taxes stand upon different grounds from the legislation referred to in the principal case: *Blount v. City of Janesville*, 31 Id. 659. The principal case is not in conflict with the principle that if the legislature has antecedent power to authorize a tax, it can cure, by a retroactive law, an irregularity or want of authority in levying it, though thereby a right of action which had vested in an individual should be divested. The question in the principal case was not as to the power of the legislature to ratify or

correct proceedings defectively taken for the assessment or collection of taxes, but as to its power to create a contract which should be binding upon the municipality, without the consent of the people thereof, or of some officer or officers representing them. It was a question as to the power of the legislature to infuse life into a void contract, against the will of the voters and tax-payers of the city, and without the assent of the common council, which alone was authorized to act in their behalf. The taxation in that case, which would have resulted from the creation of a valid contract on the part of the city, was taxation in the course of a special proceeding, and that for which a special "enabling" act was required, and not taxation for purely public purposes, over which this unlimited power of legislation prevails. It was a species of taxation which, it has been held, the legislature may authorize subject to the ratification or consent of the proper local authorities or of the people of the municipality, but not without such ratification or consent: *Mills v. Charleton, Co. Treasurer*, 29 Id. 413. Taxation is the absolute conversion of private property to public use. And its validity rests on the use. In legislative grants of the power to municipal corporations, the public use must appear: *Attorney-General v. City of Eau Claire*, 37 Id. 438; *Curtis's Adm'r v. Whipple*, 24 Id. 355. Where the agency of town supervisors is special and particular, where they are acting under a special power, the town cannot subscribe for the capital stock of a plank-road company without authority from the legislature: *Veeder v. Town of Lima*, 19 Id. 291. For a case in which slight evidence of ratification has been held sufficient, see *State v. Tappan*, 29 Id. 680. For other somewhat indefinite citations of the principal case, see *Whiting v. Sheboygan etc. R. R. Co.*, 25 Id. 216; *Hasbrouck v. City of Milwaukee*, 21 Id. 234; *Selsby v. Redlon*, 19 Id. 21.

POWER OF LEGISLATURE TO VALIDATE INVALID CONTRACTS OF AND TO IMPOSE LIABILITIES UPON MUNICIPAL CORPORATIONS.—The power which legislatures have in this regard results from the full control which they have over the funds and property belonging to public corporations, which are held for strictly corporate purposes. But however full may be the legislative authority over the public property of municipalities, yet where such bodies hold property in a private capacity, or in trust for specific uses, it is doubtful whether the legislature would be authorized to interfere with or control such property: 1 Dillon on Municipal Corporations, secs. 71, 80. Thus it is held that a legislature cannot authorize the taking of private property of a city, except for public purposes, and upon compensation made therefor: *Clinton v. Cedar R. & M. R. R. Co.*, 24 Iowa, 455; *Louisville v. University of Louisville*, 15 B. Mon. 642; *Darlington v. Mayor etc. of N. Y.*, 31 N. Y. 164; *Reynolds v. Stark Co.*, 5 Ohio, 204; *Milan Co. v. Bateman*, 54 Tex. 153.

Legislative Authority to Impose Liabilities on Municipalities.—While legislatures may authorize corporations to make legal contracts, it is questionable how far a legislature could compulsorily make contracts for them, since one of the indispensable essentials to a contract consists in the agreement of the parties. In *Atkins v. Randolph*, 31 Vt. 226, it was held that the legislature could not, without the consent of a municipal corporation, appoint an agent for it who should have authority as such to purchase property and bind the municipality to pay for it, and the same ruling has been made in *State v. Tappan*, 29 Wis. 664; S. C., 9 Am. Rep. 662. And so in Illinois: *Cairo & St. L. R. R. Co. v. Sparta*, 77 Ill. 505; though this and other cases in the same state were decided in pursuance of the peculiar provisions of the state constitution: *People v. Chicago*, 51 Id. 17; *People v. Salomon*, Id. 37; *Howard v. Drainage Co.*, Id. 130; *People v. Canty*, 55 Id. 33. But the contrary is held in *Dar-*

lington v. Mayor etc. of N. Y., 31 N. Y. 164, where the case of *Athias v. Randolph*, 31 Vt. 226, is criticised, and said to stand upon no principle. So in *Guilford v. Supervisors etc. of N. Y.*, 13 N. Y. 143, it is held that the consent of the municipality would not be essential to the validity of contracts in such cases. In *People v. Detroit*, 28 Mich. 228, S. C., 15 Am. Rep. 202, the question is made to depend upon the purpose for which the debt or liability is to be imposed, and it is held to be beyond legislative competency to coerce a municipality to contract a debt for local purposes without its consent, but it is further held that if the contract concerned a matter of public right or advantage to the state and its citizens generally, the authority of the legislature would be undoubted. It is said, in this case, that a municipal corporation is in part a mere public agency of the state, and in part is possessed of peculiar and local franchises and rights which appertain to it as a legal personality for its private as distinguished from its public advantage. "In all matters of general concern," it is said, "there is no local right to act independently of the state," but in its local objects and purposes, the state and its citizens at large have no interest so as to entitle the state legislature to control the corporation in regard thereto. The opinion in this case by Cooley, J., is one of the ablest to be found on this point, and is in accord with the general weight of authority. See, as to the distinction between the public and local attributes of corporations, *Lloyd v. Mayor*, 55 Am. Dec. 347; *Bailey v. Mayor etc.*, 38 Id. 669.

In the case last cited, it was held that the legislature could not compel a city to issue bonds and raise funds for the purchase of a public park in such city, the purpose being held to be a matter of local and not of state concern. In *People v. Batchellor*, 53 N. Y. 128, S. C., 13 Am. Rep. 480, a mandatory statute requiring a municipal corporation to subscribe for stock in a railway corporation, and issue its bonds in payment therefor, without or against its consent, was held unconstitutional.

But the construction and maintenance of improvements of a public character, by a municipal corporation, may be compelled by a state legislature: *People v. Batchellor*, 53 N. Y. 128; S. C., 13 Am. Rep. 480. The legislature of a state has power to compel local improvements by municipalities which will promote, in its judgment, the health of the people, and will abate nuisances, and in pursuance of that power may compel the opening of canals, building of levees, and imposition of local assessments to pay for the work: *Hagar v. Supervisors of Yolo Co.*, 47 Cal. 233; *Green v. Switz*, Id. 536; and likewise may compel the construction and improvement of county roads and highways, and issue of bonds therefor: *People v. San Luis Obispo*, 50 Id. 561; *People v. Flagg*, 46 N. Y. 401; improvement of streets and bridges: *People v. Power*, 25 Ill. 187; *Pumphrey v. Baltimore*, 47 Md. 145; and erection of a bridge over a watercourse, within the limits of the municipality: *Philadelphia v. Field*, 58 Pa. St. 320; *Guilder v. Otsego*, 29 Minn. 74; *Thomas v. Leland*, 24 Wend. 65; *United States v. Baltimore and Ohio R. R. Co.*, 17 Wall. 322; *Carter v. Bridge Proprietors*, 104 Mass. 236. The legislature may impose a local tax for the opening of a canal: *Caldwell v. Justices*, 4 Jones Eq. 323; or building of a court-house: *Kirk v. Shans*, 19 Pa. St. 258. It has been held that the legislature has power to direct the sale of public lands of a city, and the application of the proceeds to the erection of city buildings: *Hottelling v. Canavan*, 42 Cal. 541. A statute imposing a local tax for the payment of damages resulting from the removal of the county seat from one place to another has been held constitutional: *Williamson v. Okeatham*, 43 Ga. 258.

Power of Legislature to Compel Payment of Equitable or Moral Obligations.—A statute imposing a tax for and directing payment of a claim against a city is not unconstitutional or invalid because the claim is not such a one as the law recognizes as of legal obligation. As to the extent of legislative power in this regard, it is said that it is competent for the legislature to compel municipal corporations to recognize and pay debts not binding in strict law, and which for technical reasons could not be enforced in equity, but which, nevertheless, are just and equitable in their character, and involve a moral obligation; but it cannot compel the payment of a claim which the city is neither under a legal nor a moral obligation to pay: *Blanding v. Burr*, 13 Cal. 343; *Smith v. Moree*, 2 Id. 524; *Grogan v. San Francisco*, 18 Id. 590; *Beals v. Amador Co.*, 35 Id. 624; *Sinton v. Ashbury*, 41 Id. 525; *Creighton v. San Francisco*, 42 Id. 446; *People v. Lynch*, 51 Id. 15; *Nevada v. Hampton*, 13 Nev. 441; *Thomas v. Leland*, 24 Wend. 65; *Guilford v. Supervisors*, 13 N. Y. 144; *Brewster v. Syracuse*, 19 Id. 116; *People v. Supervisors*, 70 N. Y. 228; *Lycoming v. Union Co.*, 53 Am. Dec. 575; *New Orleans v. Clark*, 95 U. S. 644. In *Guilford v. Supervisors*, 13 N. Y. 144, the court held that a legislature has power to levy a tax upon a municipality for the payment of such a claim, and that it is no objection to the exercise of such power that the claim is not recoverable in an action against the town, nor does it alter the case that the voters of the town at a town meeting rejected the claim: See also, approving this doctrine, *United States v. Baltimore & O. R. R. Co.*, 17 Wall. 322; *Shelby Co. v. R. R. Co.*, 4 Bush, 225; *People v. Mayor etc. of Brooklyn*, 55 Am. Dec. 266; *People v. Dayton*, 55 Id. 367; *Philadelphia v. Field*, 58 Pa. St. 320; *North Missouri R. R. Co. v. Maguire*, 49 Mo. 490. In *State v. Tappan*, 29 Wis. 664, S. S., 9 Am. Rep. 624, however, the contrary has been held, the court assigning as a reason therefore that the legislature cannot impose such a liability without consent of the corporation. But the general tenor of the authorities is opposed to the views expressed in *State v. Tappan*, *supra*, and Mr. Dillon, in commenting upon that case says: "The opinion of Lyon, J., evinces great care in its preparation; but it has failed to satisfy us that in the absence of special constitutional restraints, the extent of the legislative power of taxation depends upon the consent of the municipality or the people therein:" 1 Dillon on Municipal Corporations, sec. 75, note 1.

Under a statute providing that cities should have no power to create debts without fully providing in the ordinance creating the debt the means of paying the principal and interest, a city issued bonds, but omitted such provision, and it was held that the claim on the bonds being an equitable one against the city, the legislature had authority to interfere, and require the city to pay them: *New Orleans v. Clark*, 95 U. S. 644. A corporation having created a debt, and provided a tax to pay it, but having omitted the consideration of interest, it was held competent for the legislature to direct the payment of the claim for such interest: *Beals v. Amador Co.*, 35 Cal. 625. An act directing the funding of the city's floating debt (consisting of unpaid indebtedness which it was not authorized to incur, and therefore not legally liable for), has been held valid as the recognition of an equitable claim: *Blanding v. Burr*, 13 Id. 343. Where street commissioners were to be paid out of a fund to be raised by the street assessments, and such fund was exhausted in work on the streets, it was held that the legislature might authorize the payment of the commissioners for their services out of another fund: *Sinton v. Ashbury*, 41 Id. 525. In *Brewster v. Syracuse*, 19 N. Y. 116, it was decided that the legislature had power to authorize the levy of a tax for the purpose of paying to one who had constructed a municipal improvement (a street sewer) an ad-

dition to the contract price, which the corporation was by its charter forbidden to pay, the decision resting on the ground that such addition was equitably due the contractor. Where a county was justly indebted, though not liable in law, under a contract for the erection of public buildings, the legislature was authorized to require it to issue its bonds to pay the indebtedness: *Jefferson Co. v. People*, 5 Neb. 136. Where a county officer had settled a claim against him, paying, however, more than the amount equitably due from him, the legislature was held to have authority to direct an equitable adjustment, and that the rule of law, as to voluntary payments, should not apply: *Burns v. Clarion Co.*, 62 Pa. St. 422.

A municipality cannot, however, be compelled to pay a claim for which it received no equivalent consideration: *New Orleans v. Clark*, 95 U. S. 652; or which was neither legally due, nor binding in equity or good conscience: *Hoagland v. Sacramento*, 52 Cal. 142. This latter was a case where levee commissioners of a city, by virtue of authority vested in them by the legislature, to straighten or turn the course of a river flowing through the city, in the performance of their duties, independent of the city authorities, so acted as to cause injury to the lands of a private owner in the city, and it was held that the city was under no obligation whatever to pay for the damage; and that an act imposing a liability therefor on the city was unconstitutional.

Power of Legislature to Validate Invalid Contracts and Acts of Municipalities. Legislatures may, in general, by subsequent act validate and confirm previous invalid contracts or acts of a municipality: *Bridgeport v. Railroad Co.*, 15 Conn. 475; *Frederick v. Augusta*, 5 Ga. 561; *Winn v. Macon*, 21 Id. 275; *McMillen v. Baylis*, 6 Iowa, 304; *Atchison v. Butcher*, 3 Kan. 104; *Allison v. Louisville etc. Railway Co.*, 9 Bush, 247; *New Orleans v. Pontz*, 14 La. Ann. 853; *Truchet v. City Council*, 1 Nott & M. 227; *Bissell v. Jeffersonville*, 24 How. 287; *Mattingly v. Dist. Col.*, 97 U. S. 687. And laws passed to remedy defective execution of powers of public corporations or their officers are valid though retrospective in their operation, unless they contravene some provision of the state constitution: *State v. Newark*, 27 N. J. L. 187; *Bissell v. Jeffersonville*, 24 How. 287; *Bridgeport v. Housatonic Railroad Co.*, 15 Conn. 475; *New Orleans v. Clark*, 95 U. S. 644. A statute is not unconstitutional by reason of giving validity to an act irregularly done, if the legislature could have authorized such act to be done in the irregular way in the first instance: *Lockhart v. Troy*, 48 Ala. 579. In the principal case, it will be seen, the reasoning was that since the city had no authority to make the contract when it did enter into it, the act in so doing was void, and no contract; the legislature could not validate what was not a contract; and that to impose a liability not resulting from a contract upon the city, its consent was a necessary feature. But this is contrary to the general current of authority, as will be seen by the cases collected above. See also *Fish v. Kenosha*, 26 Wis. 33; *Knapp v. Grant*, 27 Id. 47; *Single v. Marathon*, 38 Id. 363, where the right to validate a contract which might originally have been authorized was fully affirmed. But see *Mills v. Charlton*, 29 Wis. 400, explaining and supporting the principal case.

It is competent for the legislature, by subsequent enactment, to cure any defects or omissions in the proceedings of the superintendent of streets: *San Francisco v. Certain Real Estate*, 42 Cal. 517. So where a contractor for street-work, by a technical error in failing to present his claim, lost his right of action, it was held that an act directing the city to pay the contractor's claim was valid: *Creighton v. San Francisco*, Id. 450. Since, however, a legislature cannot authorize an unequal tax, it therefore cannot validate a tax for

street improvement which is not uniform or equal: *People v. Lynch*, 51 Cal. 15. A legislature may, by subsequent enactment, cure any defect in proceedings to collect a tax which it could in the first instance have made immaterial: *Emporia v. Norton*, 13 Kan. 560. As property not in the territory would not be subject to a tax, and such a tax would be void, the legislature could not, subsequently, when such property came within the district, validate the tax made while it was not subject thereto: *Atchison etc. R. R. Co. v. Maquillon*, 12 Kan. 301. As to the power of legislatures to cure defective assessments, see the exhaustive note to *People v. Seymour*, 73 Am. Dec. 727.

It is competent for the legislature to validate a city ordinance which would be void for omission to record it: *Schenley v. Commonwealth*, 78 Am. Dec. 359. So an act validating the subscription of a municipal corporation to railroad stock is constitutional: *Bridgeport v. Housatonic Railroad Co.*, 15 Conn. 475; *Commissioners v. Bright*, 18 Ind. 93; *McMillen v. Baylis*, 6 Iowa, 304; *People v. Mitchell*, 35 N. Y. 551; *Sharpless v. Mayor of Philadelphia*, 59 Am. Dec. 759, and the exhaustive note thereto; and the same ruling was made concerning a subscription to theater stock: *Municipality v. Theater Co.*, 2 Rob. (La.) 209. Statutes validating bounty awards, and taxation to pay the same, are likewise constitutional: *Bartholomew v. Harwinton*, 33 Conn. 408; *Stuart v. Warren*, 37 Id. 225; *Johson v. Campbell*, 49 Ill. 316; *Kunkle v. Franklin*, 13 Minn. 127; *Weister v. Hade*, 52 Pa. St. 474.

NEWMAN v. TYMESON.

[18 WISCONSIN, 172.]

PROPERTY CONVEYED BY DEED OR OTHER INSTRUMENT IS SUFFICIENTLY DESCRIBED where reference is made therein to another deed or writing, which is accurately pointed out, which contains a proper description, and in which it is said that such is the property sold or intended to be sold. Such a conveyance is not ambiguous or uncertain, because the means of ascertaining the true intention of the parties are clearly indicated on the face of it.

DESCRIPTION OF PROPERTY IN CHATTEL MORTGAGE IS SUFFICIENT, as between the parties, where reference is made to a schedule attached to another mortgage, of a date mentioned, made by the same mortgagor to another person.

STRANGERS ARE CHARGED WITH NOTICE OF MORTGAGE REFERRING TO SCHEDULE ATTACHED TO ANOTHER MORTGAGE, when it is filed in the proper office, if the mortgage and schedule referred to are also in the same office, open to inspection, and contain a sufficient description of the property conveyed.

SECOND MORTGAGE, REFERRING TO FIRST MORTGAGE AND SCHEDULE FOR DESCRIPTION, NEED NOT STATE that the mortgage whose schedule is thus referred to is on file.

SECOND MORTGAGEE, WHOSE MORTGAGE DECLARES THAT HE MAY AT ANY TIME TAKE POSSESSION, is entitled to the possession of the property as against all the world, except the first mortgagee whose debt is unpaid; and can maintain an action for any taking of it which was not in pursuance of the first mortgage, and therefore in defiance of his own right.

INTERESTS OF FIRST AND SECOND MORTGAGERS ARE DISTINCT, and they must sue separately for injuries to their several interests.

JOSEPH NEWMAN mortgaged certain personal property to H. B. Marsh. The property was described in a schedule attached. Subsequently, but on the same day, Joseph Newman made a mortgage to the plaintiff, James Newman, upon property described as being "the personal property specified in the schedule attached to a chattel mortgage this day given by me to Henry B. Marsh, after the said Marsh's debt is paid, if any property or money shall remain after it is paid." Both mortgages were filed in the proper office on the day they were made, Marsh's being filed first. Plaintiff's mortgage authorized him to take possession of the property at any time he chose. The defendant Tymeson, as sheriff of the county, by the direction of the other defendants, seized and sold the property described in said schedule, under attachment proceedings in favor of the other defendants against Joseph Newman. James Newman sued to recover damages for such taking. To a complaint stating the above facts, and that the debt secured by the plaintiff's mortgage remained unpaid, the defendant demurred, upon the ground that it did not state facts sufficient to constitute a cause of action, and also for defect of parties plaintiff. The demurrer was sustained for the first cause, the court holding that the reference, in the mortgage given to the plaintiff, to the schedule attached to the mortgage given to Marsh, was void for uncertainty; and that the fact that Marsh's mortgage was filed in the proper clerk's office before the mortgage to the plaintiff was filed, could not avail the plaintiff, because no reference was made in the mortgage to him to a mortgage on file. Judgment for the defendants.

J. J. Pettit, for the appellant.

O. S. and F. H. Head, for the respondent.

By Court, DIXON, C. J. The chattel mortgage executed by Joseph Newman to the appellant was not void for uncertainty. It has ever been considered a sufficient description of the property conveyed by a deed or other instrument, to refer in it to another deed or writing, which is accurately pointed out, and which contains a proper description, and say that such is the property sold or intended so to be. Such a conveyance is not ambiguous or uncertain, because the means of ascertaining the true intention of the parties are clearly indicated on the face of it: *Coats v. Taft*, 12 Wis. 388. As between the parties, the statute in no way affects or interferes

with the application of this rule to mortgages of chattels. It does not prescribe their form or the manner in which they shall be executed, but leaves those things to be determined upon the principles of the common law. Its object is to provide a public place in which they may be filed for the inspection and information of third persons who may be interested, and to declare the effect of such filing as between them and the parties. It is to enable strangers to obtain a correct knowledge of the transaction; and in order that they may do so, it is of course necessary that the mortgage itself, or some other instrument identified by it, and which is to be found in the same office, and open to inspection, should contain a sufficient description of the property conveyed. In this way, the question of description is incidentally affected by the statute, but in no other. If the party in quest of information is able, by an examination of the mortgage or the copy of it on file, and an inspection of other mortgages, also on file in the same office, and to which reference is made, to learn all the facts which are usually to be gathered from such instruments, then we think the object of the statute is attained. He is thus fairly, and at the proper place, put in possession of all the means of information which the legislature intended, and it would be too much of a refinement to permit him to close his eyes to another paper contained in the same files, and to which his attention is directed, and turn away and say that he has not had the opportunities afforded by the law. In this case, both mortgages were on file in the proper office at the time the property in dispute was seized, and there was therefore in this respect no defect.

The point that the previous mortgage is not mentioned as being on file, is also too technical. It is enough that it is otherwise sufficiently described. Its customary place would be upon the files. The inquirer has but to ask the question, and if it is not there, his investigations are at an end.

The appellant was, by virtue of the mortgage, entitled to the immediate possession of the property, as against all the world, save the mortgagee named in the first mortgage, if still unpaid, and consequently can maintain an action for a taking which was not in pursuance of that mortgage, but in defiance of his right: *Frisbee v. Langworthy*, 11 Wis. 375.

The appellant's interest, and those of the first mortgagee, are entirely distinct and separate. They are neither joint tenants nor tenants in common of the property, and must sue sepa-

ately for injuries to their several interests. The action is properly brought in the plaintiff's name alone: *Welch v. Sackett*, 12 Wis. 243; *Hill v. Gibbs*, 5 Hill, 56.

The judgment of the circuit court is reversed, and the cause remanded for further proceedings according to law.

WHERE DESCRIPTION IN DEED MAY BE MADE CERTAIN BY REFERENCE to some record, contract, or fact of which proof is admissible, or of which the court will take notice, it is sufficient: See note to *Atwood v. Cobb*, 26 Am. Dec. 666; *McCullough v. Wall*, 53 Id. 715; *Fitzpatrick v. Fitzpatrick*, 75 Id. 681; *Gilbert v. North American Fire Ins. Co.*, 35 Id. 543.

AS TO WHAT CONSTITUTES GOOD DESCRIPTION OF MORTGAGED CHATTELS, by reference to schedule, etc., see *Winslow v. Merchants' Ins. Co.*, 38 Am. Dec. 368; *Burditt v. Hunt*, 43 Id. 289.

THE PRINCIPAL CASE IS CITED IN *Milwaukee and Minnesota R. R. Co. v. Milwaukee and Western R. R. Co.*, 20 Wis. 187, to the point that it may be impracticable to set forth in a chattel mortgage with precision all the articles embraced in it, so that without reference to other evidence or sources of information one could tell, by an inspection of the mortgage, the property intended to be conveyed. But safety and sound principle would seem to require that the description of the property should be such as to enable third persons to identify it, aided by inquiries which the mortgage itself indicates and directs.

CALKINS v. SUMNER.

[13 WISCONSIN, 193.]

WORDS SPOKEN IN JUDICIAL PROCEEDING, THOUGH ACTIONABLE PER SE, ARE PRIMA FACIE PRIVILEGED, and to sustain an action for slander in speaking such words, the complaining party must show that they were not pertinent or material, and that the speaker was animated by ill will and hatred.

ACTION FOR SLANDER WILL NOT LIE AGAINST WITNESS, IF WHAT HE SAID WAS PERTINENT and material to the issue, no matter how much he may be actuated by hatred or ill will.

WITNESS IS NOT ANSWERABLE IN DAMAGES for any statements he may make responsive to questions put to him, and which are not objected to and ruled out by the court; or concerning the impertinency or impropriety of which he receives no advice from the court or tribunal before which the proceeding is had.

SLANDER. Defendant, while a witness in a judicial proceeding, testified that in a certain other judicial proceeding plaintiff had lied. Plaintiff thereupon brought this action. In the second instruction, the court charged the jury that the fact that the words were spoken in a judicial proceeding, and in response to questions put to him as a witness, constituted no justification.

Rockwell and Converse, for the appellant.

D. S. C. Brooks, for the respondent.

By Court, DIXON, C. J. There can be no doubt that the circuit judge was in error when he decided that upon the facts admitted by the pleadings, the burden of proof as to malice was upon the defendant; that it was for him to show that the words were spoken in good faith and from justifiable motives, instead of it being for the plaintiff to prove that they arose from feelings of malignity, or that there was malice in fact. To support an action for verbal or written slander, it is necessary that the charges should be false, and that they should be maliciously made. And although where the words used are actionable in themselves, the law ordinarily implies malice from the act of speaking or writing them, and distinct proof of malice is not required; yet when they are written or spoken by parties, counsel, witnesses, jurors, or judges in the course of a judicial proceeding, they are *prima facie* privileged. The circumstances under which they are thus spoken or written exclude the legal notion of malice, and it lies with the party complaining to establish that they were not pertinent or material to the subject in controversy, and that the speaker or writer was animated by ill will and hatred. This principle is vindicated by the adjudications upon the subject, and is consistent with reason. For it would be extremely inconsistent, and I might say absurd, for the law to presume that judicial proceedings of any kind are resorted to for the mere purpose of enabling parties to indulge their malice and utter slanders, and not in good faith, to attain some legitimate end, or to perform some lawful act or duty, which is useful and beneficial to themselves or others. On the contrary, the presumption is very strong that persons so situated are using legal proceedings for proper purposes, and that what is said or done proceeds from sufficient cause and right motives; and when that which thus transpires may constitute the basis of an action at all, it is only upon the ground that there is proof of express malice, and that the person complained of has availed himself of his position to gratify his malevolence, by defamatory expressions against parties or others, which have no connection with or bearing upon the subject under investigation. The only exception to this rule as to the burden of proof which could possibly arise upon the answer of a defendant, would be when it discloses facts showing express malice,

and then I apprehend that a court would hardly put him upon or allow him to come in with his proof that there was no malice, and in that way disprove his answer, in which the very gist of the action is admitted. It is not pretended that such is the case with the present answer, but the court seems to have been governed by the idea that the law implies malice under such circumstances, which we have shown to be incorrect.

The court also erred in the first instruction to the jury, viz.: "If the evidence was given maliciously, no matter how pertinent to the issue, it is slander." The rule is exactly the other way, as will be found by an examination of a great number of authorities collected and referred to in a note in the first volume of American Leading Cases, page 186. The rule is, that if what is said or written be pertinent and material to the cause or subject-matter of inquiry, the speaker or writer is not liable to an action, however much he may be actuated by hatred or ill will. In such cases, there can be no doubt that much may be said and done which is very detrimental to the object of it, but it is one of the many instances which must be considered a loss without an injury, and where the claims of the individual must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible.

It follows, from what has already been said, that the second instruction was erroneous also, and that those asked by the defendant's counsel should have been given. I think the correct rule in regard to a witness's liability to an action for what he may say pending his examination before a judicial tribunal is, that he is not answerable in damages for any statements he may make which are responsive to questions put to him, and which are not objected to and ruled out by the court, or concerning the impertinency or impropriety of which he receives no advice from the court or tribunal before which the proceeding is had. It seems to me that he may rest safely upon the mere silence of the court and those interested in the subject under examination. We all know that a great majority of the persons called upon to testify in our courts of justice are wholly ignorant of the rules of evidence by which legal proceedings are governed; and that if they were not, they are, in most instances, unacquainted with the true nature of the controversy and the exact legal condition of the

issue between the parties, so that they could not determine for themselves the materiality or pertinency of their answers to particular questions propounded. Besides, it is not for them to decide such questions. The law has imposed that duty exclusively on courts, and others having authority to hear and determine disputed questions of law and fact. Witnesses do and must rely on the conduct of courts and the counsel engaged, and in the absence of objection or warning, ought to be permitted, without fear of harm or molestation, to make truthful and direct responses to all questions which may be put to them. They may be compelled to attend and give evidence, and when duly notified, the law makes it their unavoidable duty to do so; and to make them responsible in damages, and, as it were, criminally, for such obedience to a legal requirement, would be a most wicked and intolerable outrage.

The judgment of the circuit court is reversed, and a new trial awarded.

WORDS, WHEN PRIVILEGED, BECAUSE SPOKEN IN JUDICIAL PROCEEDINGS: See note to *Faris v. Starke*, 33 Am. Dec. 541; *Hastings v. Insk*, 34 Id. 330, and note 340; *Mower v. Watson*, Id. 704.

THE PRINCIPAL CASE WAS CITED in *Hutchinson v. Lewis*, 75 Ind. 60, to the point that "the due administration of justice requires that a witness should speak, according to his belief, the truth, the whole truth, and nothing but the truth, without regard to the consequences; and he should be encouraged to do this by the consciousness that, except for any willfully false statement, which is perjury, no matter that his testimony may in fact be untrue, or that loss to another ensues by reason of his testimony, no action for slander can be maintained against him."

REES v. LUDINGTON.

[13 WISCONSIN, 276.]

LIEN FOR WORK AND MATERIALS ON BUILDING is a privilege derived entirely from statutory provision, and cannot be maintained beyond the extent of the grant of the act by which it is conferred.

UNDER WISCONSIN STATUTE, LIEN OF MECHANICS AND OTHERS IS SUBORDINATE to that of the vendor of the land on which the building is erected, for unpaid purchase-money. See R. S. Wis., c. 120, secs. 1, 11.

MECHANIC'S LIEN STATUTE OF WISCONSIN DOES NOT CREATE ANY DISTINCTION BETWEEN EMPLOYER'S OWNERSHIP OF BUILDING and his ownership of the land with which it is connected. The former must follow the latter, unless it has been separated by the agreement of competent parties.

MECHANIC OR MATERIAL-MAN ACQUIRES LIEN FROM COMMENCEMENT OF BUILDING upon the legal or equitable estate of their employer in the premises; but it is equal only to that of a judgment. It cannot be superior to it.

WHERE VENDOR EXECUTES AND DELIVERS DEED, AND IMMEDIATELY RECEIVES MORTGAGE BACK as security for the price, the acts are but parts of the same transaction, contemporaneous and connected, and afford no opportunity for the liens of judgment or other creditors of the grantee to attach to the legal estate before that of the grantor for the unpaid purchase price.

WHERE, AFTER BUILDING IS ERECTED, VENDOR OF LAND EXECUTES DEED FOR IT TO VENDEE, AND IMMEDIATELY TAKES MORTGAGE back upon the premises to secure the unpaid purchase-money, the mortgage is only a continuance of the vendor's lien in another form, and is superior to the liens of the mechanic and the material-man.

A STATEMENT of facts is presented in the opinion.

A. C. Fraser and Wells and Brigham, for the appellants.

Waldo, Ody, and Van Valkenburgh, for the respondent.

By Court, DIXON, C. J. This action was brought by Rees, the respondent, to foreclose a mortgage given by David P. Hull. The appellants were made parties defendant, as subsequent incumbrancers, and the complaint sought the foreclosure of their rights. The appellants answered, claiming mechanic's liens on the dwelling-house erected by Hull on the mortgaged property, and also on the right, title, and interest of Hull in and to a portion of the mortgaged premises, not exceeding one acre in extent.

The facts which are not disputed are briefly these: Rees made a contract with Hull to convey to him certain lots in Milwaukee, at an agreed price of ten thousand dollars, and to execute a deed to Hull on the first of December, 1857. Hull on his part agreed to make valuable improvements on the property, in particular to erect a brick dwelling-house on it, and to have the same inclosed within one year from the date of the contract, and on receiving a deed from Rees, to give him back a bond and mortgage for the purchase-money. This contract was dated November 18, 1856, and was duly recorded. Hull commenced the building, under the contract, about August 1, 1857, and the lien of these appellants grew out of materials furnished and work done for that building. Hull complied with the contract on his part, and on the eighteenth of November, 1857, Rees made a deed to Hull, and took back from Hull the bond and mortgage for the foreclosure of which this action is brought. The respondent claims that his mortgage lien is paramount. The appellants claim that their lien is prior to the lien of the mortgage; and that is the question here.

It will be conceded by all that a lien for work and materials on a building is a privilege derived entirely from statutory provision, and cannot be maintained beyond the extent of the grant of the act by which it is conferred. The determination, therefore, of the nature and extent of the appellants' lien for materials depends on the true construction of the statute in force at the time they were furnished. If, as was insisted by the counsel, it gave them a complete and absolute lien on the building, independently of any title or interest in the land upon which it was erected, so that the owner was not a trespasser or disseisor, and then added or annexed to such absolute lien a further lien upon such right, title, and interest in the land, if any, as belonged to him, in that case I should say that so far as the building is concerned the lien of the appellants would be paramount, and entitled to protection. I must confess that at the argument I was very strongly impressed with the idea that such was the proper construction. The language of the first section of the act (R. S. 1849, c. 120), in my judgment, very clearly and decidedly supports that conclusion, and if I were now to determine the question upon that section alone, my opinion would remain the same.

But another provision of the act, which was not particularly noticed or commented on at the bar, has led me to change my views. It is found in section 11, which prescribed the manner in which sales upon executions should be made, and the effect of conveyances under them. It was in these words: "And such officer shall give to the purchaser a deed of conveyance of the premises sold, which shall be valid and effectual to pass all the right, title, and interest of the defendant in and to said premises absolutely, whether the same be in fee-simple, for life, or for years." Here we have the end and fruit of all the rights and privileges conferred by the act upon mechanics and material-men. Purchasers under judgments in their favor, themselves, if they became such, acquired the right, title, and interest of the person owning the building, whether the same was held for life, in fee-simple, or for years. They acquired just his rights—nothing more, and nothing less. They succeeded to his title, and represented his interest in the premises as a whole. They had no divided or several interest unless he had, but took the property, buildings, and lands as one entire thing, and by one entire and indivisible title, whenever it was so held by him. If, under any circumstances, he was bound to treat the premises as an entirety, then were they

also, for they but occupied his former position. This, it appears to me, is the plain and obvious import of the language. It leaves no room for distinguishing between the purchaser's ownership of the building and his ownership of the land with which it was connected. Both are spoken of as constituting one piece of property; the title as one title, and that such as the former owner had to the land. The plain inference is, that unless the title to the building had been previously separated by the act or agreement of competent parties, it was to follow and be governed by that of the land, and not that it could be subsequently separated, and take a new direction which the original owner had no right to give to it. The nature of the title which the purchaser was thus declared to acquire, its unity and indivisibility, are wholly incompatible with the absolute lien of the mechanic and material-man upon the building itself, united with a lesser interest in the land on which it was erected, supposed to have been given by the first section. The inconsistency is so complete and radical that it undoes and destroys the force and effect which might otherwise be given to the first; and therefore I must conclude that the legislature did not intend by it to confer a lien which should operate more extensively than the judgment and execution which followed and were founded upon it. If we are correct in these views, the design was to give to the mechanic a lien from the commencement of the building equal in power and effect with the lien of another creditor who had obtained and docketed a judgment. The legislature gave him all the advantages of a judgment, both as to the legal and equitable estate of the owner, but did not intend the lien should operate beyond the sphere where a judgment would be effectual.

Under this construction of the statute, the other question presented by the record is easily determined. The case stands as if the appellants had, at the time the building was commenced, been judgment creditors of Hull, whose judgments were a lien upon his equitable interest in the premises. If, having been such judgment creditors, their liens would have been prior to that of the respondent's mortgage, then they are now; but if not, then they are subsequent, and must be postponed to the lien of the mortgage. The authorities clearly establish that Rees's interest in, or lien upon, the premises for unpaid purchase-money, was not diminished or impaired by his execution and delivery of a deed, when at the same time he received back a mortgage as security for the price. The

settled doctrine in such cases is, that when property passes through a man without his having paid for it, and with an understanding that he is at once to secure the payment by a mortgage or lien on the property itself, no right vests in him except that which is subject to such payment; that to the extent of the unpaid price, he is, in contemplation of law, never the owner until it is paid. The delivery of the deed to the vendee, and his execution and delivery of the mortgage, or other security for the unpaid purchase-money, are but parts of the same transaction, done in pursuance of the same agreement, and have such operation only as will best promote the lawful intention of the parties. Their operation is contemporaneous and connected, and affords no opportunity for the liens of judgment or other creditors of the grantee, to attach to the legal estate, before that of the grantor for the unpaid price. The doctrine is wholesome and just. No claim can be more equitable than that of the unpaid vendor to reimbursement out of the proceeds of the estate with which he has parted upon that express condition. Holding the estate, and having a right to retain the title until the payment of the purchase-money shall be satisfactorily secured, why should not effect be given to the agreement between himself and the vendee in that respect? Certainly the creditors of the vendee ought not to complain, for without the agreement there would have been nothing upon which their rights could ever possibly have attached; and claiming a benefit from their debtor's purchase, by means of his contract with the vendor, they have no right to be placed in a better situation than the debtor himself. Their interest is based upon his, and cannot in equity and justice go beyond it: *Holbrook v. Finney*, 4 Mass. 566 [3 Am. Dec. 243]; *Chickering v. Lovejoy*, 13 Id. 51; *Clark v. Munroe*, 14 Id. 351; *Stow v. Tift*, 15 Johns. 458 [8 Am. Dec. 266]; *Love v. Jones*, 4 Watts, 465.

In this case, the interest of the respondent as mortgagee of the premises must be regarded as identical with his interest as vendor under the previous executory contract of sale, and therefore paramount to the lien or interest of the appellants. It is but a continuation of his original security under another form.

The judgment of the circuit court, being in accordance with these principles, is affirmed, with costs.

LIEN OF MECHANIC OR MATERIAL-MAN DATES FROM COMMENCEMENT OF WORK, or the furnishing of materials: *Monroe v. West*, 79 Am. Dec. 524, and note thereto.

ESTATE AND INTEREST TO WHICH MECHANIC'S LIEN EXTENDS: *Monroe v. West*, 79 Am. Dec. 524, and note thereto; *Lyon v. McGuffey*, 45 Am. Dec. 676, and extended note thereto 678-680; *Bank of Charleston v. Curtis*, 46 Id. 325; *Loonie v. Hogan*, 61 Id. 683, and note 688.

MECHANIC'S LIEN IS SUBORDINATE TO VENDOR'S LIEN: *Gillespie v. Bradford*, 27 Am. Dec. 494.

DIFFERENT WRITINGS MUST BE TAKEN AS ONE INSTRUMENT, when executed at the same time and with reference to the same subject-matter: *Dunlap's Adm'r v. Wright*, 62 Am. Dec. 506, and collected cases in note thereto 511. Thus a deed and mortgage back for the purchase-money, although bearing dates, if delivered at the same time, constitute but one transaction: *Newbegin v. Langley*, 63 Id. 612, and note 614; *Cake's Appeal*, 62 Id. 328. As to when the execution of new mortgages will be considered as merely changing the form of old incumbrances, and not as the creation of new ones, see *Swift v. Kraemer*, 73 Id. 603.

THE DOCTRINES OF THE PRINCIPAL CASE are discussed and fully sustained in *Campbell and Pharo's Appeal*, 78 Am. Dec. 375.

THE PRINCIPAL CASE WAS RELIED UPON AND FOLLOWED by the court in disposing of *Jessup v. Stone*, 13 Wis. 468, 469. It was cited in *Bryant v. Small*, 35 Id. 209, to the point that the lien of a mechanic or material-man exists by virtue of the statute and the performance of the labor, or the furnishing of the materials, but that the party must file his petition, and commence his action within the period prescribed to enforce it, or it will be lost. It was also cited in *Denniston v. Unknown Owners*, 29 Id. 362, to the point that a grant of lands not to take effect until the execution of a trust deed is ineffectual until the trust deed is executed. No estate passes until then, when it instantly passes to the trustees. The grant and trust deed are parts of the same transaction, and can operate only as the legislature intended they should operate.

TOWN OF ROCHESTER v. ALFRED BANK. PHELPS v. ALFRED BANK.

[13 WISCONSIN, 482.]

TOWN BONDS ISSUED PURSUANT TO LAW NOT YET IN FORCE for want of publication are without authority of law and void.

TOWN SUPERVISORS CANNOT, OF THEMSELVES, GIVE VALIDITY TO VOID BONDS, where the assent of the people of the town is required to enable them to issue such bonds.

THERE CAN BE NO INNOCENT PURCHASER OF VOID BONDS, where the defect is a matter of law, with a knowledge of which every person is chargeable. "IGNORANCE OF THE LAW EXCUSES NO ONE," is MAXIM applicable to purchasers of bonds void for some defect which is matter of law unmixed with matter of fact.

INNOCENT PARTIES CANNOT BE RELIEVED AGAINST MUTUAL IGNORANCE AND MISTAKE OF LAW if there is no element of fraud or bad faith introduced or relied upon.

A STATEMENT of facts is presented in the opinion.

Finches, Lynde, and Miller, for the appellants.

A. G. Cole, C. W. Bennett, and William P. Lyon, for the respondent.

By Court, DIXON, C. J. These two cases depend upon the same state of facts, and involve the same questions of law. Both are actions brought to restrain the collection of certain taxes in the towns of Burlington and Rochester, in the city of Racine, and to test the validity of certain bonds purporting to have been issued by the boards of supervisors of those towns, pursuant to chapter 138 of the private laws of 1856, to aid in the construction of the Fox River Valley railroad. The taxes were levied for the purpose of paying the interest on the bonds. The validity of the bonds and the power to levy the taxes are denied, upon the ground that the act in pursuance of which the bonds are said to have been issued was not published until after they were executed and put in circulation, and this is the only question to be decided. By the fifth section, the supervisors possessed no power to issue the bonds, until a majority of the legal voters of the town, voting on the question, at an election to be called for that purpose, should vote in favor of the same. It is conceded that the act is a general law, within the decision of this court in the cases of *State v. Lean*, 9 Wis. 279, and *Clark v. Janesville*, 10 Id. 136; and that as such it could not, under the constitution, take effect until published. It is likewise conceded that it was not published until after the elections were held and the bonds issued. It appears, also, that the bonds have gone into the hands of third parties, for value, without actual notice of defects, except such as the law implies, and that in the years 1857 and 1858 the supervisors appointed commissioners to vote upon the stock received in payment for the bonds.

Upon these facts, it is insisted on the part of the appellants: 1. That the respondents are estopped by the recitals in the bonds from asserting that there was no law in force at the time they were issued authorizing the same; and 2. That if they can impeach the recitals, their acts in relation to the bonds are such that they ought not now to be permitted to deny their legality.

The first point is obviously bad. The appellants do not propose to deny the recitals of the bonds, conceding the instruments to be such, but to show that they are not bonds, and therefore that there are no recitals by which an estoppel can

be created. They propose to go back of the objection taken by the respondents, and to show that the foundation upon which it must rest does not exist. The supervisors could not issue the bonds without previous legislative authority, and if such authority was wanting, their action was void. To claim, therefore, that their recitals that they had such authority are conclusive as against a proposition to show that they had not, is equivalent to claiming that they could act and could bind the towns, even though they possessed no such power, which is absurd. It is to make the question of authority wholly immaterial, and to say that the unauthorized action of the board is as obligatory and effectual as that which was authorized. The rule that a party is estopped from disputing a fact which he has solemnly admitted by deed assumes the existence and validity of the deed, but it does not preclude him from showing that he never made it. So here, the recitals that the bonds were issued in pursuance of a law of the state of Wisconsin do not prevent our inquiring whether there was such a law, for if there was not, then they are no bonds, and the recitals are of no effect whatever. It being conceded that within the former decisions of this court there was no such law, it follows that the bonds must fall for want of power to execute them, unless they have been ratified since the law took effect, or unless the subsequent conduct of the respondents has been such as to estop them from denying their validity. And we do not think they can be sustained on either of these grounds.

In the first place, it is to be observed that the power of the supervisors to take any step or to consummate anything in the way of issuing the bonds, depended upon a previous vote of a majority of the voters of the town in favor thereof. Unless authorized by the voters, they derived no authority from the act to issue them. They were made the agents of the voters, who were the real parties in interest, for the purpose of making an agreement with the railroad company for stock, and paying for the same in the bonds of the town; and by the express terms of the act, they could do so only upon obtaining the assent of the voters in the manner therein required. The voters or inhabitants of the town being the contracting party upon one side, and the railroad company upon the other, and the supervisors the mere agents of the former, having no power to act without their assent, it follows that if they did so act, that action was nugatory and void. But as the assent of the voters could only be obtained upon the authority of law, if

there was no law then there was no authority, and consequently no assent; and the supposed election was wholly futile and useless. So that if the bonds had been issued after the law took effect, yet as the election was had before, there would still be this reason for holding them inoperative. Now, as the voters were the principals, and the supervisors the agents, it would seem obvious that any ratification of the previous unauthorized acts of the latter, after the power to do so became complete, must come from the voters, and not from the supervisors. For it would be manifestly contrary to reason to say that the agent himself might ratify and confirm his own unauthorized act. This proposition is so self-evident that argument upon it is unnecessary, if not impossible. Hence it is that the acts are wholly inefficacious to give validity to the bonds, except as they were directed or assented to by a majority of the voters after they had acquired the power to do so by the due publication of the law. The only acts, either on the part of the supervisors or the voters, which are claimed to have any tendency to show a ratification, are the appointments of commissioners in the years 1857 and 1858. These appointments were made by the supervisors alone, and it is not pretended that the voters had or took any part in making them. They were matters over which the voters had no control, and to which their assent cannot be presumed. There has, therefore, been no ratification of the bonds, and it remains to be determined whether the voters have otherwise concluded themselves from denying their validity.

On the part of the respondents it is strenuously insisted that they have. It is urged that by neglecting to interfere and assert their legal rights, and restrain the issuing of the bonds, at a time when they might have done so, so as to have saved innocent third parties, they ought now to be estopped from denying their legality, or the authority of the supervisors to issue them. It is said that their failure to act and to protest when the opportunity was afforded them, so as to protect not only themselves but the public, is a recognition of that authority, and that they should not now be permitted, as against innocent third persons, to escape from the fulfillment of obligations which have thus tacitly received their sanction. There can be no doubt of the general force and correctness of these principles, and that under ordinary circumstances such conduct would constitute a valid estoppel *in pais*. The authorities cited fully demonstrate that they are applicable to

cases like the present, where no other principle interferes to prevent their operation. As applied to the cases cited, we yield our fullest assent to them. But they are inapplicable here, for the reason that the nature of the defect in the original execution and issue of the bonds is such that there can in law be no innocent holders of them. The defect was in matter of law, with a knowledge of which every person is chargeable. It was in matter of law unmixed with any particular matter of fact. It was that there was no law authorizing them, and of this all parties were bound to take notice, as well the purchasers as the seller of the bonds. They were presumed to know the provisions of the constitution as well as the time when the statute became operative under them. In this respect, neither party possessed advantages superior to those of the other. It was information which was alike open to all, and of which all were equally bound to avail themselves for the purpose of forming an opinion upon their legal rights. This is an old and well-settled rule of the law, its maxim being that ignorance of it will not excuse; and although it may operate with some severity in the case before us, it cannot be disregarded. By taking notice of the time when the law took effect, and examining the date of their issue, it appears upon the face of every bond that they were executed without legal authority. No stronger case of the rule that ignorance of the law will not excuse or protect could be put. So long, therefore, as the bonds were void upon their face, and within the actual or presumed knowledge of all the world, it certainly cannot be contended that the voters were guilty of any laches or negligence in not restraining their sale or circulation. It would be idle to say that they must commence a series of lawsuits for the purpose of apprising third persons of that which they already knew; and it was clearly time enough for them to resist or deny when the validity of the bonds was seriously asserted and an effort made to collect them, which, for aught they knew or might reasonably presume, would never be done. No element of actual fraud or bad faith is introduced or relied upon. They are cases of mutual ignorance and mistake of the law, against which the holders, though otherwise innocent, cannot be relieved.

The cases of *State ex rel. Ganett v. Van Horne*, 7 Ohio St. 327, and *State ex rel. Smead v. Trustees of Union Township*, 8 Id. 394, are distinguishable from these in this, that there the mistake consisted in a matter of fact of a private or particular

nature, of which the public or third persons were not bound to take notice, but which was known to the tax-payers of the township, while here it consists in a matter of law which all are presumed to know; or if it may in any sense be considered matter of fact, that is, the time when a general law takes effect, then of such matter of fact as every person must know. The objections there were, that the lines of the railroads were not actually established and located through the townships before the elections were held. The court says, admitting this to have been necessary to authorize the elections, that it was too late for the tax-payers to deny their obligations, after permitting the trustees to issue the bonds, and after paying the interest for several years without protest or interference. And so we think. The general authority of the trustees to call the elections and issue the bonds after a vote to that effect was unquestioned. The objection was to a matter of fact, which was private in its character, and peculiarly within the knowledge of the tax-payers. It was one to which the purchasers of the bonds were in no way privy, and of which they were not bound, at their peril, to take notice. It was at most a mere irregularity in the exercise of a valid power, and not an attempt to act without any legal authority whatever. And such the court evidently regarded it; for in the last-named case they say "that the township, while retaining the price and proceeds of the bonds, proposes to set up as a defense to their payment that the township had not in fact proceeded in all respects strictly in conformity to the statute in issuing said bonds, and that therefore they are void." In this respect, therefore, these cases fell fully within the doctrines of *Commissioners of Knox County v. Aspinwall*, 21 How. 539, and the other cases cited by the appellant's counsel, but they furnish no guide for the determination of the present.

The judgment of the circuit court must be affirmed.

IGNORANCE OF LAW: See extended note to *Storrs v. Barker*, 10 Am. Dec. 323; *Lawrence v. Beaubien*, 23 Id. 155; *Champlin v. Laytin*, 31 Id. 382; *Norton v. Marden*, 32 Id. 132; *State v. Papp*, 56 Id. 303; when a ground for relief, see note to *Trigg v. Read*, 42 Id. 467. Courts have tried to uphold the maxim that ignorance of law shall not excuse, but in cases of peculiar hardship they have distinguished between ignorance of the existence of a law and of its legal effect: *State v. Papp*, 56 Id. 303.

RELIEF AGAINST MISTAKE OF LAW WILL BE GRANTED WHEN: *Lawrence v. Beaubien*, 23 Am. Dec. 155, and note 164; *Norton v. Marden*, 32 Id. 132; *Boane v. Strobe's Adm'r*, 38 Id. 744, and note 746; *State v. Papp*, 56 Id. 303, *Champlin v. Laytin*, 31 Id. 382.

THE DOCTRINE OF THE PRINCIPAL CASE, as to the invalidity of bonds issued by the officers of a town pursuant to a vote of the people thereof in aid of the construction of a railroad, before the law authorizing such vote and the issue of such bonds was published, was followed in *Berliner v. Town of Waterloo*, 14 Wis. 378. A court may properly take judicial notice of the existence of a public act, without the same being pleaded or proved: *Castello v. Landwehr*, 23 Id. 528. Laws authorizing "certain counties, towns, cities, and villages to aid," etc., without naming and designating them in the titles, are not, strictly speaking, local or private laws within the meaning of the constitution: *Lawson v. Milwaukee etc. R'y Co.*, 30 Id. 600. An instrument cannot be the bond of the town unless the acts of the voters have made it so; for the voters are the principals and town supervisors are the agents, having no power to act except upon the conditions specified in the statute: *Veeder v. Town of Lima*, 19 Id. 299. The supervisors of the town, or the chairman of the board of supervisors, and the town clerk, are mere agents of the voters or inhabitants of the town: *Lawson v. Schnellen*, 33 Id. 294. The principal case was cited in each of the above authorities and to the point stated. It was also cited, among others, in *Yellow River Improvement Co. v. Arnold*, 46 Id. 222, which cases define what are general laws within the meaning of the provision of the constitution requiring their publication before they can take effect. It was also cited as to what constitutes public or general acts within the meaning of the constitution, in *Burhop v. City of Milwaukee*, 21 Id. 260. It was commented upon in *Bound v. Wisconsin Cent. R. R. Co.*, 45 Id. 567. It was also cited in the same case (p. 568), to show that the court would not be influenced, in bond cases, by the cry of "repudiation" being hurled at it.

.CASE v. JEWETT. CASE v. CONROE.

[13 WISCONSIN, 498.]

WHERE PROPERTY COVERED BY CHATTEL MORTGAGE, PROPERLY FILED, IS SO TAKEN AND CONVERTED within the year after the filing as to give the mortgagee a good cause of action for such taking, it is unnecessary for the preservation of his right to recover, that he should commence his action within the year from such filing, or that the mortgage should be renewed at the end of the year by affidavit, as required by statute, in order to make it valid against subsequent purchasers or mortgagees.

WHERE CHATTEL MORTGAGEES EMPLOY THEIR MORTGAGOR TO FILE THEIR MORTGAGE, and he, at the time of filing it, for his own purposes and without their knowledge, requests the clerk "to place it at the bottom of the pile, so that nobody would see it," and says that he does not want anybody to know that he has given it, such request is not within the scope of his agency for the mortgagees, and does not prejudice their rights.

ACTIONS for damages for the wrongful taking and conversion of chattels, which were in the possession of the plaintiffs at the time of such taking, and to which they claimed title. Judgments for the defendants. The facts are stated in the opinion.

Edson Kellogg, for the appellants.

A. W. Farr, for the respondents.

By Court, PAINE, J. These two actions involve the same questions, and were tried together by stipulation. The plaintiffs claim the property in question in both suits, under a chattel mortgage executed to them by one Grannis, the original owner. The defendants claim under execution sales upon judgments recovered against Grannis after the making and filing of the mortgage, the property having been seized and sold in each case within less than a year after such filing.

The court charged the jury that the plaintiffs could not recover unless they had "commenced their actions during the life of the mortgage, or had kept it alive by affidavit, as provided by the revised statutes." We have several times decided this the other way; and that if a party wrongfully takes property covered by a chattel mortgage then existing, so that the mortgagee has a right of action against him, it is not essential, in order to preserve such right of action, to renew the mortgage by affidavit at the end of the year from its filing: See *Newman v. Tymeson*, 12 Wis. 448, and cases there cited.

One of the questions made on the trial was that of fraud in the mortgage. It appears from the evidence that the mortgagor got the chattel mortgage drawn at the town clerk's office, and filed it there. He requested the clerk to "place it at the bottom of the pile, so that nobody would see it," and said that "he did not want anybody to know he had given it." The court instructed the jury that "if they believed that the mortgagor, Grannis, acted as the agent of the plaintiffs in going to the witness Abell and getting the mortgage in question drawn and filed, then the plaintiffs would be bound by all the acts and declarations of said agent relating to said mortgage made at that time." We think this also was erroneous. It is undoubtedly true that they would, in such case, be bound by all the acts and declarations of the agent within the scope of his agency. But if the mortgagor, merely to subserve some fraudulent intention of his own, should, in addition to performing the business intrusted to him by the mortgagees, request the town clerk to hide the mortgage after it was filed, the mortgagees, not having authorized any such request, and knowing nothing about such intention, certainly ought not to be prejudiced by that. Any such act on the part of the mort-

gagor would be entirely beyond and outside of his agency. It would be a request in his own behalf, and not in behalf of the mortgagees.

Suppose a man in good faith and without any notice of any fraudulent intent in the vendor, buys a horse, and then employs the vendor to take the horse to a stable to be kept, if the vendor should then request that the horse might be concealed, to subserve his own fraudulent purposes, would the purchaser be bound by that? Would that be the same as though the vendee had requested such concealment to enable the vendor to defraud his creditors? Certainly not. Such request would not be within the scope of the vendor's agency, and the fact that he may make it at the same time he is fulfilling his agency does not change its character so as to render it the act of his principal. If the mortgagees authorized any such request, it would perhaps be conclusive evidence that they knew of the fraudulent intent of the mortgagor. But if the latter made the request of his own motion, without their knowledge or consent, it was outside of the scope of his agency, and not binding upon them. For these reasons, the judgments are reversed, with costs, and a new trial awarded.

CITATION OF PRINCIPAL CASE.—Section 2315, revised statutes of Wisconsin, requires an affidavit of renewal to be annexed to the chattel mortgage, or copy thereof on file, within thirty days previous to the expiration of two years after the mortgage was given; and the clear intent of this provision is that in case of failure to make the affidavit the mortgage ceases to be valid as against creditors who thereafter seize the property, or purchasers who thereafter purchase it: *Lowe v. Wing*, 56 Wis. 34.

COUNTY OF DANE v. SMITH.

♦ [13 WISCONSIN, 565.]

WISCONSIN COURTS OF RECORD, HAVING CRIMINAL JURISDICTION, HAVE POWER, AND IT IS THEIR DUTY, TO APPOINT COUNSEL to defend persons charged with crime, and whose poverty renders them unable to employ counsel.

COUNTY MUST PAY FOR SERVICES OF COUNSEL APPOINTED BY COURT TO DEFEND PAUPERS and other indigent persons charged with crime; because there is an implied promise to pay, and an employment previously authorized.

COUNTY MUST PAY FOR SERVICES OF COUNSEL APPOINTED BY COURT TO DEFEND INDIGENT PERSONS charged with crime, notwithstanding a statute which declares that a county shall not be held liable to pay for such services. Such a statute is void: See Laws of Wisconsin, 1860, c. 35.

LEGISLATURE HAS NO POWER TO CONFER AUTHORITY ON COURTS TO APPOINT COUNSEL TO DEFEND INDIGENT PERSONS charged with crime, and at the same time to require that the services of counsel shall be rendered in such cases without compensation.

SMITH, the plaintiff below, was an attorney of the circuit court for Dane county, and was appointed by that court to defend one Cahoon, charged with larceny. Cahoon was, at the time of trial, too poor to employ counsel. Smith rendered services in accordance with his appointment; and which were reasonably worth twenty-five dollars. His claim was presented to the board of supervisors for Dane county, but it was not allowed. The court below found, as a conclusion of law from the above facts, that the county was liable to pay Smith the sum of twenty-five dollars, and rendered judgment accordingly.

H. M. Lewis, district attorney, for the plaintiff in error.

Rollins and Smith, for the defendant in error.

By Court, DIXON, C. J. The facts in this case are, in effect, the same as those in the case of *Carpenter v. Dane County*, 9 Wis. 274; and that decision would be conclusive upon them, were it not that they occurred since the enactment of chapter 85 of the laws of 1860, which is supposed to have put an end to the liability of the counties in such cases. The appointment was made, and the services rendered by the defendant in error at the April term 1860, of the Dane circuit court. The supervisors disallowed the claim; and upon appeal, the circuit court, the facts being stipulated, reversed their decision, and directed judgment to be entered for the defendant in error. Upon this judgment, and the exceptions taken, this writ of error is brought.

The case of *Carpenter v. Dane Co.*, 9 Wis. 274, was put upon the ground that the courts of record of this state, having criminal jurisdiction, possess competent legal authority to appoint counsel to defend paupers and other indigent persons charged with crime, and to bind the county by such appointment. This power, and the duty in proper cases of exercising it, are expressly affirmed. It was placed on the basis of the common law, and constituted the foundation of the judgment there pronounced. The conclusion that the courts possessed such power was supported by arguments drawn from a variety of sources. The benign provisions of the constitution by which criminal trials are in other respects governed; the right of the accused to the assistance of counsel; the just and humane results arising

ing from the exercise of this power; the interest of the public in the correct and fair administration of the criminal law; and the well-known and constant practice of the courts from the first organization of the government—were averted to and considered, all for the purpose of establishing that proposition, and showing that such was the law. With the correctness of that conclusion, we are still well satisfied. The power results from the necessities of the case. Public justice and sound policy demand it. It may be said that the rights of the prisoner, who is so poor as to be unable to secure the services of counsel, may safely be intrusted to the care and protection of the court and the public prosecutor. But a slight experience in judicial affairs will demonstrate the fallacy of that position, and show that however vigilant the court might be, or however upright and conscientious the prosecutor, it would, as a general practice, be most unsafe and hazardous. The antagonism and conflict of opposing and experienced minds, each anxious and active to detect and expose the defects and weaknesses in the cause of the other, are in general absolutely essential to the discovery and establishment of legal truth; and more particularly is this true of the investigation of extensive and complicated questions of fact, such as are often presented in the prosecution of public offenders. And however criminal trials may have been heretofore, or are now, conducted elsewhere, this kind of *ex parte* trial would at this time, and in this country, be generally considered extremely partial and discreditable. It is certainly better that the public purse should be opened, and the people taxed to pay for them, than that defenses in such cases should be dispensed with, or that they should be made entirely at the expense of single individuals.

But to return to the legal question now before us; having established that the courts had the power to make the appointment and order the services, it followed as a necessary legal consequence that the person appointed and who rendered them was entitled to a just compensation. This was, of course, to come from the county, that being the municipality to which, under our system, all such expenses are chargeable. The liability of the county, therefore, results from the existence and exercise of the power, not perhaps because the court is authorized to contract for the county or its officers, for strictly speaking it has no such power, but because the law, which gave the power to order, implied the promise to pay. This is agreeable to the general doctrine that whoever knowingly re-

ceives or assents to the services of another, which are of value and contribute to his benefit, impliedly undertakes to pay such sum as the services are reasonably worth. It has even a stronger foundation—that of an employment previously authorized.

This being the state of the law at the time of the passage of the statute above referred to, we will next consider what was its effect. It is in these words: "Where, in a criminal action or proceeding, any attorney or counselor shall defend the person charged with any offense, by order of the court or otherwise, the county in which such action or proceedings arose shall not be held liable to pay the attorney or counselor for services in making such defense." If, before its enactment, there was any doubt about the power of the courts to order attorneys and counselors to defend persons charged with the commission of offenses, there certainly can be none now. The legislature have not only not removed it, but they have expressly recognized its existence and validity. They have, in effect, said that the courts have and may exercise it, but that the attorney or counselor, who, in obedience to it, makes the defense, must, as a penalty for complying with the lawful command of the court, do so without compensation. Can the legislature do this? Can they command the time and services of the citizen, not officially, but professionally, not in a matter which concerns the taxing power, the general enforcement of the laws, or the public defenses, but in one which relates exclusively to his private trade or calling, and then say that he shall receive no pay for them? We are of opinion that they cannot. We think that there is a limit to legislative authority in these particulars, and that that limit will be found in the legitimate accomplishment of some one of the general purposes above indicated. We do not believe that the legislature have the power generally to say to the physician, the surgeon, the lawyer, the farmer, or any one else, that he shall render this or that service, or perform this or that act in the line of his profession or business, without remuneration. If they could do so in one instance, they could command his whole time and services in the same manner—a stretch of power for which, we believe, no one will contend.

Nor do we think that the legislature can leave with the courts the authority to order and employ, and at the same time destroy the implied promise to pay. The latter arises immediately out of the former, and is, in the law, so inseparably

connected with it that where the former exists, the latter exists also. Unless the services are rendered gratuitously, which, under such circumstances, cannot be presumed, the promise of payment follows as of course. The statute, therefore, is so inconsistent with itself that no effect can be given to it. It is for that reason void.

We do not, however, desire to be understood as saying that it is not in the power of the legislature to withdraw or repeal the authority of the courts, and to say that indigent persons accused of crime shall go undefended. We leave that for future discussion. But we do wish to have it understood that when the present salutary and beneficent rule is changed or abrogated, the responsibility will rest with the legislature, and not with us.

The judgment of the circuit court is affirmed, with costs.

THE PRINCIPAL CASE WAS DISTINGUISHED in *Weisbrod v. Supervisors of Winnebago Co.*, 20 Wis. 418. It was there held that counsel appointed by the circuit court to defend a prisoner indicted for crime cannot recover against the county for services rendered in the supreme court upon exceptions, or error in the same cause, no appointment having been made in this court.

PLACE v. LANGWORTHY.

[18 WISCONSIN, 629.]

CONFLICTING CASES AS TO EFFECT OF STIPULATION IN MORTGAGE PERMITTING MORTGAGOR TO RETAIN POSSESSION, etc.: 1. A stipulation in a mortgage permitting the mortgagor to retain possession of a stock of goods, and to make purchases from time to time, and to sell off in the ordinary manner, is only *prima facie* evidence of fraud, and may be rebutted by circumstances showing that the transaction was fair and honest; 2. Such a provision in a chattel mortgage of a stock of goods vitiates the instrument, and renders it void in law; 3. Such provisions in assignments for the benefit of creditors have generally been held to render such assignments void as to creditors.

MORTGAGE OF STOCK OF GOODS, AUTHORIZING MORTGAGOR TO RETAIN POSSESSION of the property, and to dispose of it in the ordinary and regular course of retail trade, "paying out of the proceeds of the sales all necessary store and business expenses, together with all expenses for the support of the mortgagor and his family for an indefinite period," so long as he shall deposit the excess to the credit of the mortgagee, is, upon its face, fraudulent in law, and void as to creditors.

ACTION for the taking and conversion of a stock of goods. The plaintiffs claimed title under a mortgage executed to them by one Harshaw to secure a debt of four thousand odd

dollars due from him to them. The defendant justified the taking of the goods, as an officer, under certain writs of attachment issued against Harshaw at the suit of other creditors. The condition of the mortgage is given in the opinion. It was also a condition of the mortgage that all moneys collected by the sales, and applied to the payment of said indebtedness, should be daily deposited in bank to the credit of the mortgagees as part payment, etc. Defendant requested the court to instruct the jury that the mortgage was, upon its face, fraudulent and void as to creditors. The instruction was refused. Judgment for the plaintiffs.

Cary and Pratt, for the appellant.

Waldo, Ody, and Van Valkenburgh, for the appellees.

By Court, COLK, J. The respondents derive title to the stock of groceries and provisions in controversy, under the chattel mortgage given by James Harshaw, on the sixth day of January, 1859. The controlling question in the case is as to the effect and validity of that mortgage. The counsel for the appellant contends that the mortgage is fraudulent and void on its face on account of the provision therein contained, that Harshaw might retain possession of the stock of goods, and trade with and sell them in the ordinary and regular order of retail trade, applying the proceeds of the sale, after deducting therefrom all necessary store and business expenses, and the expenses for the support of himself and family, to the payment of the mortgage debt, so far as such proceeds should come into his hands in money or otherwise. It is insisted that this provision in the mortgage renders the instrument fraudulent and void on its face, so far as the creditors of Harshaw are concerned. This view of that provision in the mortgage, we are disposed to adopt as the most satisfactory result at which we can arrive.

It must be admitted that the authorities are far from harmonious upon the question as to the effect of analogous provisions in chattel mortgages, when the mortgagor is authorized to retain possession of the goods mortgaged, and to make sales of such property in the ordinary course of business—some holding such stipulations illegal, and to be conclusive evidence of fraud, while others consider them only as badges of fraud, which may be explained and reconciled with an honest and fair intent to the satisfaction of a jury. It is idle to attempt to reconcile these cases by any course of reasoning or upon

any principle of law. The following are some of the cases where a stipulation in a mortgage, permitting the mortgagor to retain possession of a stock of goods, and to make purchases from time to time, and to sell off in the ordinary manner, were held to be only *prima facie* evidence of fraud, which might be rebutted by circumstances showing that the transaction was fair and honest: *Briggs v. Parkman*, 2 Met. 258 [87 Am. Dec. 89]; *Jones v. Huggsford*, 3 Id. 515; *Barnard v. Eaton*, 2 Cush. 294; *Abbott v. Goodwin*, 20 Me. 408; *Oliver v. Eaton*, 7 Mich. 108; *Gay v. Bidwell*, Id. 519.

The doctrine, I understand, is disapproved of in the following authorities, which hold that such a provision in a chattel mortgage in a stock of goods vitiates the instrument and renders it void in law: *Diver v. McLaughlin*, 2 Wend. 596 [20 Am. Dec. 655]; *Wood v. Lowry*, 17 Id. 492; *Griswold v. Sheldon*, 4 N. Y. 580; *Gardner v. McEwen*, 19 Id. 123; *Collins v. Myers*, 16 Ohio, 547; *Freeman v. Rawson*, 5 Ohio St. 1; *Harman v. Abbey*, 7 Id. 218; *Jordan v. Turner*, 3 Blackf. 309; while such provisions in assignments for the benefit of creditors have generally been held to render such assignments void as to creditors: *Brooks v. Wimer*, 20 Mo. 503; *Walter v. Wimer*, 24 Id. 63; *Stanley v. Bunce*, 27 Id. 269; *Billingsley v. Bunce*, 28 Id. 547; *Davis v. Ransom*, 18 Ill. 396.

We are not aware that the supreme court of this state has ever had occasion to consider and pass upon the validity of a chattel mortgage, when the mortgagor was expressly authorized by the terms of the instrument to retain possession of the goods mortgaged—to sell the same in the ordinary course of business, and after paying the store and business expenses, and the expenses necessary to support himself and family out of the proceeds, then to apply the balance of such proceeds to the discharge of the mortgage debt. No such question was presented for adjudication in the case of *Cotton v. Marsh*, 3 Wis. 221, and of course was not decided. We are therefore unembarrassed so far as the decisions of our own courts are concerned, and are at liberty to adopt that rule on the subject which seems to us most safe, reasonable, and proper. And we have therefore no hesitation in saying, notwithstanding the respectable authorities to the contrary, that a clause in a mortgage like the one under consideration, which expressly authorized the mortgagor to retain possession of the mortgaged goods, and to deal with and dispose of them in the ordinary and regular course of retail trade, paying out of the proceeds

of the sales all necessary store and business expenses, together with all expenses for the support of the mortgagor and his family for an indefinite period, so long as the excess, if any there was, was deposited to the credit of the mortgagees, is a provision directly calculated, in our judgment, to hinder, delay, and defraud creditors, and therefore is strictly within the spirit of the statute of frauds. When the nature and character of a chattel mortgage is considered, there seems to be something incongruous and unnatural in the idea that it could attach to such variable and mobile elements as a stock of groceries and provisions, where the possession and power of disposition and of replenishing the stock remain with the mortgagor, and where the security cannot accurately be said to be a specific lien upon any particular property, but in the forcible language of Judge Read, as used in the case of *Collins v. Myers*, 16 Ohio, 547, "the mortgage becomes a floating one, which attaches, swells, and contracts as the stock in trade changes, increases, and diminishes, or wholly expires by an entire sale and disposition at the will of the mortgagor." Not to dwell upon this point, however, and assuming a mortgage upon property thus circumstanced to be good and valid in law, still it appears to be going further than the conveniences of trade and commerce require, or than the interests, rights, and protection of third parties will justify, to sustain stipulations like the one we are now considering. For it seems to us that a provision that the mortgagor may continue in possession, and deal with and sell off the goods mortgaged, paying the expenses of the business and all personal and family expenses out of the proceeds of the sales—thus placing his stock in trade beyond the reach of creditors—of itself furnishes a pretty effectual shield to a dishonest debtor. It matters not how large his own expenses may be, or how much it may cost to support his family, those expenses all come out of the stock in trade before anything is applied to the payment of even the mortgage debt. An arrangement of this nature ought not to be tolerated, and when it appears upon the face of the instrument, it should render it void in law.

It was contended by the counsel for the respondents that the court cannot pronounce the mortgage void upon its face, except where its provisions are necessarily injurious to the creditors of the mortgagor. But even within this strict and rigid rule, we think we are authorized in saying that an agreement which permits the debtor to support himself and family

out of the proceeds of the business must unavoidably be injurious to the creditors. For however extravagant and unreasonable those expenses may be, they are to be paid. Such stipulations, therefore, we deem fraudulent in law. And inasmuch as it appears on the face of the instrument itself, which the court must construe, the court can say and is authorized to pronounce the stipulation illegal.

We are therefore of the opinion that the circuit court erred in holding that the mortgage was not fraudulent and void as to creditors on its face, but was a valid, legal, and binding instrument. This was expressly ruled, both in refusing the instructions asked for on that point by the appellant, and in the general charge of the court.

For this reason, the judgment of the circuit court must be reversed, and a new trial ordered.

EFFECT OF STIPULATION IN CHATTEL MORTGAGE PERMITTING MORTGAGOR TO RETAIN POSSESSION.—1. That it is only *prima facie* evidence of fraud, and that this presumption may be repelled by satisfactory evidence, see note to *Edgell v. Hart*, 59 Am. Dec. 535; *Bumpas v. Dotson*, 46 Id. 81; *Briggs v. Parkman*, 87 Id. 89; 2. That it is void on its face for fraud towards creditors, see *Read v. Wilson*, 74 Id. 159, and note 161; *Edgell v. Hart*, 59 Id. 532, and note 535; *Randlett v. Blodgett*, 43 Id. 603; *Ford v. Williams*, 67 Id. 83; 3. That the question of fraud must be submitted to the jury, see *Googins v. Gilmore*, 74 Id. 472; note to *Ford v. Williams*, 67 Id. 87. As to effect of assignment without transfer of possession, see *Forsyth v. Matthews*, 53 Id. 522.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: A chattel mortgage, permitting the mortgagor to remain in possession, to sell and apply the proceeds, or any part of them, to his own use, is fraudulent and void in law as against creditors: *Blakeslee v. Rossman*, 43 Wis. 123; *Fisk v. Harshaw*, 45 Id. 668, 670, 674; *Steinart v. Duester*, 23 Id. 138. Where a chattel mortgage is given for a greater amount than is due, the fact that such a mortgage is taken from one known by the mortgagee to be in failing circumstances, and pressed by his creditors, is conclusive evidence of fraud, and the jury should be so instructed in a proper case. And while the question as to whether there was a fraudulent intent is generally one of fact, yet it is as much a question of law whether a conveyance of this character, made under such circumstances, is fraudulent, as it is whether an absolute conveyance, made with a secret trust in favor of the vendor, is fraudulent: *Butts v. Peacock*, 23 Id. 361.

GRAVES v. SMITH.

[14 WISCONSIN, 5.]

WAREHOUSEMAN HAVING IN HIS POSSESSION GOODS SUBJECT TO OWNER'S DIRECTIONS as to their shipment is at liberty, in the absence of instructions, to use his discretion in shipping by the usual or best route; but if he has specific instructions, he is bound to follow them.

WHERE SHIPPER OF GOODS NOTIFIES WAREHOUSEMAN that he has contracted with a certain railroad company to carry them to their destination, and the warehouseman replies that "it is all right," he has no right to afterwards send the goods in any other way; and if he does so, and they are lost, he will be liable therefor.

EMPLOYMENT OF WAREHOUSEMAN AND FORWARDING MERCHANT, IN USUAL COURSE OF HIS BUSINESS, imports a hiring, and that he is to be paid.

FORWARDER EMPLOYED WITH DIRECTIONS TO SEND GOODS BY RAILWAY to their destination, who ships them by water, is guilty of a conversion thereof.

BAILER LIABLE ONLY FOR GROSS NEGLIGENCE IS STILL LIABLE FOR ACTUAL CONVERSION of the property.

APPEAL from the Milwaukee county court. The opinion states the case.

Brown and Ogden, for the appellants.

Smith and Salomon, for the respondents.

By Court, PAINE, J. We can discover no error in the rulings of the court below in this case. The action was brought to recover the value of a quantity of flour sent by the plaintiffs to the defendants as warehousemen in Milwaukee, consigned to H. McGraw & Son, McGrawville, New York. The complaint alleges that after the flour had been so received by the defendants, and while it was in their possession, the plaintiffs, through a properly authorized agent, instructed them to forward it by the Detroit and Milwaukee railway; but that, in violation of such instructions, they sent it by a propeller around the lakes, whereby it was lost. The answer admits the receipt of the flour, admits that it was sent by a propeller, averring that to be the usual mode, and denies that the plaintiffs ever instructed the defendants to send it by the Detroit and Milwaukee railway. The only issue made was, therefore, whether this instruction was given; and this is conceded in the brief of the appellants' counsel. The court fairly submitted this question to the jury, telling them that if the defendants "received no instructions in respect to the flour, they were at liberty to use their discretion in shipping by the usual or best route; but if they had specific directions, they were bound to follow those directions." That this is correct law, there is no question. But the court proceeded to tell the jury that if they found "that the notice was given as testified, and understood by the clerks of the defendants, then the plaintiffs were not to lose by the inadvertence or carelessness of the clerks," and they should find for the plaintiffs, etc. The principal objection relied on by the ap-

pellants' counsel is to this part of the charge. They say it assumes that the notice testified to was sufficient to amount to an instruction to the defendants to send the flour by the Detroit and Milwaukee railway, which they deny. It becomes necessary, therefore, to look at the evidence upon this point, to see whether it warranted the instruction given. The testimony was that one Wilbur was sent by one of the plaintiffs to make arrangements for shipping the flour, that he contracted with the railway company to carry it, and gave them an order for it. He then, not knowing the defendants, took one Holmes with him, who did know them, for the purpose of notifying the right parties. Wilbur testified that there were persons doing business in the office; that "Holmes called for the way-bills or books, which were handed him; that Holmes then told them who Wilbur was, and that he had contracted with the Detroit and Milwaukee railroad to take that McGraw flour that way, and had given an order for it, and that they would call for it;" that the "gentleman said, 'Very well'—or something to that effect." Holmes testified that he went there with Wilbur, who requested him to go and notify the right parties, and that he did notify Mr. David Smith and Mr. Peck, and that one of them said "it was all right." He says he introduced Mr. Wilbur as coming from Mr. Graves about the McGrawville flour, and told them that the order had been given to the Detroit and Milwaukee railroad for it. He says he does not think he told them it would be called for, but that was implied.

The evidence offered by the defendants had a tendency to show that these conversations did not take place. But whether they did or not was fairly left to the jury, to whom it properly belonged. And all that we have to determine is, whether, assuming that they did take place, they amount to a direction to the defendants to deliver the flour to the railway company. Of this we have no doubt. Nobody of ordinary intelligence could understand it otherwise. The witness Holmes was right in saying that when he told them an order for the flour had been given to the railway company, it was implied that they would call for it. It was also clearly implied that when called for it should be delivered. There could have been no other possible motive for giving the notice, and no other construction could have been placed on it by the defendants. The defendants have in their possession, as warehousemen, the flour of the plaintiffs, subject to the plaintiffs' directions as to shipping. The plaintiffs notify them that they have contracted with a

particular line to carry the flour, and given an order for it, and the defendants say it is all right. Is it possible, after such a conversation, that the defendants could send the flour in another direction, upon the pretense that they supposed that they still had a discretion to send it by whatever route they pleased? We think not; and that defendants' agents who testified would not claim exemption on that ground. They claimed that no such conversation as was testified to by the plaintiffs' witnesses ever took place. But their testimony implies that if it ever had taken place, and they had been made to understand the language used, they would have made no question about its being a direction about the flour. We think, therefore, there was no error in the charge in this respect.

But it is further claimed, that inasmuch as the complaint did not aver that the defendants acted for hire, it is to be assumed that they were to charge nothing, and that they were therefore liable only for gross negligence. And it is then said that it should have been submitted to the jury to determine whether there was gross negligence. We do not think, however, that it can be assumed, on the allegations of the complaint, that the defendants were to have no pay. It avers that they were warehousemen and forwarding merchants, exercising that business, and that being so, the plaintiffs caused the flour to be delivered to them, and that they then undertook to forward it by the railway line, upon the request and direction of the plaintiffs. That being so, they would clearly have been entitled to their reasonable charges as warehousemen and forwarding merchants. It is probably very seldom that express agreements are made with respect to the charges of such persons. But when any one employs them in the usual course of their business, that imports a hiring, and that they are to be paid. Powell, J., in *Coggs v. Bernard*, Ld. Raym. 909 (1 Smith's Lead. Cas. 284), says: "The doubt is because it is not mentioned in the declaration that the defendant had anything for his pains, nor that he was a common porter, which of itself imports a hire, and that he is to be paid for his pains." So in *Dartnall v. Howard*, 4 Barn. & Cress. 345, S. C., 10 Eng. Com. L. 609, it is clearly implied that if it had been averred that the defendant had been employed as an attorney, or as exercising any business which made it his absolute duty to use ordinary care and skill, the count would have been good although not saying expressly that he was to be paid. Now, it is obvious that warehousemen exercise such a business

This is assumed by the defendants, and is relied on as a defense. They aver in their answer, after admitting the receipt of the flour, "that in the ordinary and customary course of their business, they were obliged to forward the same to its destination," etc., and that "as they were bound to do," they did so forward it. We think, therefore, that the facts stated in the complaint import a hiring of the defendants, and that they were entitled to their reasonable charges as warehousemen and forwarding merchants. So that if the action were brought for negligence, it could not be assumed that their agreement was without consideration.

But the true answer to this objection is, that the action is not brought for negligently doing what they undertook to do, but for doing something entirely different, which amounted to a conversion of the property. And with this view it was immaterial whether they were liable for gross or for ordinary negligence. A bailee liable only for gross negligence is still liable for an actual conversion of the property. And if the defendants were employed with directions to send the flour by the railway line, it was undoubtedly a conversion for them to send it around the lakes.

For these reasons, we think there was no error; and the judgment is affirmed, with costs.

BAILER IS GUILTY OF CONVERSION IF HE USES BAILED PROPERTY IN DIFFERENT MANNER from that designated in the contract of bailment: *Creech v. Gullifer*, 69 Am. Dec. 118, note 121, where other cases are collected.

BLISS v. WEIL.

[14 WISCONSIN, 25.]

DECREE OF FORECLOSURE OF MORTGAGE OF WHICH ONE INSTALLMENT ONLY IS DUE, containing a clause allowing the plaintiff to apply for a further order of sale upon a subsequent installment falling due, and for an execution for any deficiency that might remain, where the entire premises were sold and did not bring enough to pay the first installment for which the decree was rendered, is not a bar to a personal action against the mortgagor for a subsequent installment when it becomes due.

NOTE NOT DUE WHEN MORTGAGE BY WHICH IT IS SECURED IS FORECLOSED is not merged in the decree, and the decree is not a bar to a personal action on the note brought against the mortgagor.

WHERE MORTGAGED PREMISES ARE ALL SOLD TO SATISFY FIRST INSTALLMENT due upon the mortgage, the court cannot enter up a personal judgment against the mortgagor, for a subsequent installment when it becomes due.

APPEAL from the circuit court for Washington county. The opinion states the case.

Thorp and Shelly, and Finches, Lynde, and Miller, for the appellant.

A. R. R. Butler and L. F. Frisby, for the respondent.

By Court, COLE, J. The single question presented in this case is, whether the proceedings and decree of foreclosure in the United States district court constitute a bar to this suit. The action is brought on a promissory note, given by the respondent to the appellant, bearing date the twenty-sixth of August, 1857, for three thousand one hundred and forty dollars, and made payable two years from date. At the same time another note was given for eight hundred and twenty-seven dollars and twenty-one cents, payable ninety days from date. To secure the payment of these notes, a mortgage was simultaneously executed by the respondent and wife. When the first note became due, proceedings were instituted in the United States district court for a foreclosure and sale of the mortgaged premises, to pay the amount due. A decree of foreclosure and sale was entered, by which the court adjudged that the sum of eight hundred and sixty-one dollars was then due on the notes and mortgage; that the sum of three thousand one hundred and forty dollars was to become due with interest; and that the mortgaged premises could not be sold in parcels; and ordered a sale of the mortgaged premises. The premises were sold and bid in by the appellant for four hundred dollars, and a judgment for the deficiency due and unsatisfied was given on the coming in and confirmation of the marshal's report. The decree also contained the usual clause that in case the amount actually due, with interest and costs, should be paid before the sale, the complainant might, at any time thereafter, when any principal sum or interest secured by the note and mortgage should become due, go before a master on the foot of the decree, and procure a report of the amount which might be due, to the end that upon the coming in and confirmation of such report a decree might be made for a sale of said premises to satisfy the amount due; and a further clause for judgment for any deficiency ultimately found to be unsatisfied by the proceeds of the mortgaged property. Now, it is contended that this decree constitutes a bar to an action upon the second note; and the circuit court so decided. This decision we hold erroneous.

Chancellor Kent states that the general rule is, that the mortgagee may exercise all his rights at the same time, and pursue his remedy in equity upon the mortgage, and his remedy at law upon the bond or covenant accompanying it concurrently: 4 Kent's Com. 184. In the absence of special statutory provisions prohibiting it, there seems to be no doubt that the appellant might have brought his action at law upon the notes when due, and at the same time foreclosed the mortgage in equity. And although there has been a great conflict in the authorities in England and in the United States as to what would be the effect of bringing an action at law upon the obligation after a foreclosure in equity, and whether such action would open the foreclosure and let in the equity of redemption, still we find nothing in the cases which sustains the decision of the circuit court in this case. We fail to perceive anything in principle or reason which forbids the appellant from sustaining the action. His debt has not been paid. The mortgaged property has been sold and fully exhausted. Unless he has an action *in personam*, he is remediless in the premises.

We have been referred to section 78, chapter 84, of the revised statutes of 1849, which declares that after a bill is filed for the foreclosure of a mortgage, while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by a court of chancery. But this shows that even under that statute a suit at law might be prosecuted on the special order of the court of equity. The statute, however, requiring special leave is not now in force, and consequently the cases of *Williamson v. Champlin*, 8 Paige, 70, and *Suydam v. Bartle*, 9 Id. 294, to which our attention has been called, are inapplicable.

It is suggested that the record of the district court is a complete bar to the action, for the reason that the appellant could have obtained execution on application to that court for any deficiency after the sale of the mortgaged premises. But the note upon which the suit is brought was not merged in that decree, and no judgment was then given upon it, for the obvious reason that it was not due. The decree does not profess to cover this note; it merely provides that when it should become due the appellant might go before a master on the foot of that decree, and procure a report as to the amount due, and that upon the coming in and confirmation of that report, a

further decree might be made for a sale of the mortgaged property. This clause in the decree was based upon section 89, chapter 84, of the revised statutes of 1849, and was undoubtedly intended to save the mortgagee the necessity and expense of filing a bill for a foreclosure and sale of the mortgaged property whenever any installment of principal or interest became due. Having once obtained a decree for a sale of the property, he was enabled to avail himself of its conditions whenever default was made, while the property remained unsold. But surely that portion of the decree would have been ineffectual, and would have had nothing to operate upon after the property had been sold. It was not designed to give the mortgagee the right to come into court, after the sale, and enter up a personal judgment upon the notes accompanying the mortgage. Such was not the object of these conditions in decrees of foreclosure, and we are not aware that such a practice has ever obtained. It appears to us that it would be a great stretch of power in a court to enter up personal judgments in that manner, and the practice ought not to be tolerated. So since there never has been a judgment on the note sued on, and as it would be irregular and improper to attempt, after a sale of the mortgaged premises, to give a judgment upon it under the decree in the United States district court, the record of that court offered in evidence constituted no bar to the action. Having no remedy under that decree, he should be permitted to proceed on the note and recover the balance of the debt: 4 Kent's Com. 184, and cases cited in the notes; *Hatch v. White*, 2 Gall. 152; *Omaly v. Swan*, 3 Mason, 474; *Schoole v. Sall*, 1 Sch. & Lef. 176; *Dunkley v. Van Buren*, 3 Johns. Ch. 330; *Globe Ins. Co. v. Lansing*, 5 Cow. 380 [15 Am. Dec. 474].

The judgment of the circuit court is reversed, and a new trial ordered.

FORECLOSURE OF MORTGAGE WHICH SECURES INSTALLMENTS FALLING DUE AT DIFFERENT TIMES: See *Wood v. Trask*, 76 Am. Dec. 230, note 232.

RUSSELL v. LAWTON.

[14 WISCONSIN, 202.]

THOUGH SHERIFF AND HIS DEPUTIES ARE REGARDED AS ONE OFFICER, for many purposes, this rule cannot be extended so far as to make the sheriff chargeable with notice of all that has come to the knowledge of any of his deputies. Where, therefore, an execution is delivered to a deputy sheriff, who returns it unsatisfied because he could find no property upon
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which to levy, and the sheriff, without notice of the senior execution in the hands of his deputy, levies a junior execution upon the property of the same defendant, he will not be liable to the senior execution creditor for having first satisfied the junior execution.

APPEAL from the circuit court of Rock county. The opinion states the facts.

Mat. H. Carpenter, for the appellant.

J. H. Knowlton, and Rockwell and Converse, for the respondents.

By Court, **COLE, J.** It is very clear that this action is one sounding in tort, and that it cannot be maintained, unless the appellant, or his deputy, Wright, was guilty of some neglect of duty for which the law holds the sheriff liable. Do the facts show this to be the case? Those facts are few and undisputed, and are in substance as follows:

On the ninth day of February, 1859, the appellant, as sheriff of Rock county, had delivered to him an execution in favor of the Bank of Beloit against the Racine and Mississippi Railroad Company, and by direction of the judgment creditors, levied the same upon eleven hundred and ten dollars, coin, the money of the railroad company, and paid it over as money made upon the execution. On the preceding fourth day of February, an execution in favor of the respondent and against the same defendants was delivered to Sydney Wright, a deputy of the appellant, which was returned unsatisfied, for the reason that the officer could find no property upon which to levy. The respondent has brought this action to recover the amount of the execution delivered to Wright, insisting that because it was placed in the hands of the deputy before the junior execution was delivered to the sheriff, it should first be satisfied, and that the sheriff was guilty of misconduct in not thus applying the money that came to his hands, instead of paying it over to the bank. At the same time it is conceded that the sheriff acted in perfect good faith in the matter, and that when he levied upon and paid over the money to the bank he had no notice whatever that his deputy held any execution against the same debtor. In view of these facts, upon what principle is it sought to charge the appellant in this action? It is this: A delivery of an execution to a deputy sheriff is said in legal effect to be a delivery to the sheriff himself, since, in contemplation of law, all the deputies of the sheriff are but one officer, being all servants of the same master, and that

therefore the sheriff must be held chargeable with constructive notice of the prior execution in the hands of his deputy. And upon this fiction of the law, the whole case hinges.

It is undoubtedly true that for many purposes a sheriff and his deputies are regarded as one officer, in the sense that an official act of the deputy is deemed the act of the sheriff, and the sheriff is held responsible for such act as his own, though he may have had no personal knowledge of the matter, and been individually guilty of no wrong. All processes are directed to the sheriff as such, who is required to do the thing therein commanded to be done; and the sheriff is responsible to the world for all breaches of duty, or official misconduct on the part of any of his deputies. For this reason, an action for a breach of duty of the office of sheriff must be brought against the high sheriff, though the breach was by the default of the under-sheriff: *Cameron v. Reynolds*, 1 Cowp. 403. In this sense, the sheriff and his deputies may be said to constitute one officer. But still the deputies of a sheriff, in relation to each other, must often be considered as several officers, with distinct rights, and acting with distinct liabilities: *Odiorne v. Colley*, 2 N. H. 66 [9 Am. Dec. 39]; *Vinton v. Bradford*, 13 Mass. 114 [7 Am. Dec. 119]; *Thompson v. Marsh*, 14 Id. 269; *Bagley v. White*, 4 Pick. 395 [16 Am. Dec. 353]. The maxim, then, that a sheriff and his deputies constitute but one person, has received qualification in various cases which have come before the courts. Philosophically speaking, of course, the maxim has no truth or foundation whatever. The legal identity of the sheriff and his deputies is maintained for the plain and obvious purpose to render the sheriff, in a civil action, liable for the official acts of his deputies as if they were his own acts. But to say that whatever comes to the possession of one or all the deputies comes to the possession of the sheriff, and that he is chargeable with notice of all which comes to the knowledge of any and all his deputies, is a proposition of law which, we think, cannot be maintained. And the fallacy of the proposition cannot, perhaps, better be illustrated than by applying it to the circumstances and facts of this case. It is not pretended that the deputy Wright was guilty of any neglect of duty in not seizing, under his execution, the coin belonging to the railroad company. If he could have found this coin, he was expressly authorized by our statute to levy upon it, and pay it over as so much money collected upon the execution: Sec. 19, c. 134, R. S. 1858. But

it does not appear that by the exercise of any degree of diligence he could have found the coin. So the deputy has not been guilty of any default or misconduct, and if this action is maintained, it is very obvious the sheriff can have no action over against his deputy.

But to bring to a closer test the proposition that a sheriff and all his deputies must be considered as one person, and that the sheriff must be chargeable with notice of all matters which come to the possession or knowledge of such deputies, take a case suggested on the argument, and which will occur to any one reflecting on the subject. An execution against A is put into the hands of a deputy, who knows of no property belonging to A to satisfy the same. Another deputy has information of property possessed by A sufficient to satisfy the execution, but has no knowledge that an execution is out against him. The sheriff has no knowledge of any execution against A, or of any property belonging to him. Under these circumstances, is the sheriff to be charged with constructive notice of the execution in the hands of one deputy, and of the information possessed by the other in respect to property belonging to the debtor, and thus held liable for a breach of duty in not making the money on the execution which he never saw? To contend for such a proposition would seem little else than the most glaring absurdity; and yet we see no escape from such a result, if the maxim that the sheriff and his deputies are to be regarded as one person is to be accepted without limitation. The only ground for saying that the sheriff is liable in this action, is that when he paid the money which he had collected on the junior execution over to the bank, he must be chargeable with notice of the senior execution in the hands of his deputy. It is admitted that he acted in the matter with entire good faith, and did not know that Wright held or had any execution against the railroad company in favor of the respondent. We think, under these circumstances, to hold him liable "is to carry beyond the reason of the principle and into flagrant absurdities the maxim that the sheriff and his deputies constitute but one person." Whether the liability of the sheriff would have been changed had he collected and paid over the coin to the bank with actual knowledge of the prior execution in the hands of the deputy, we are not called upon to decide. At common law, it is well settled, the execution had relation to its teste, and bound the goods and chattels of the debtor from that date.

This rule was changed by the statute of frauds, which declared that the execution should bind the property only from the time it was delivered to the sheriff to be executed: *Smalcomb v. Buckingham*, 1 Com. 35; *Payne v. Drewe*, 4 East, 523; *Hotchkiss v. McVickar*, 12 Johns. 403; *Lambert v. Paulding*, 18 Id. 311; *Marsh v. Lawrence*, 4 Cow. 461.

Probably in Kentucky the sheriff would be held to be in default for paying over money on a junior execution, knowing that a prior one was in the hands of his deputy: *Million v. Commonwealth*, 1 B. Mon. 310 [36 Am. Dec. 580]; *Ferguson v. Williams*, 3 Id. 302 [39 Am. Dec. 466]. And when the money produced on the second execution happened to remain in the hands of the sheriff when an application was made to the court for a rule directing to whom it should be paid, it has been ordered to be paid to the plaintiff in the first execution: *Lambert v. Paulding*, 18 Johns. 311. In New York, however, the execution is a lien upon the property of the judgment debtor from its delivery to the sheriff: *Marsh v. Lawrence*, 4 Cow. 461; while our statute declares that "personal property shall be bound from the time it is seized on execution:" Sec. 18, c. 134. Whether this statute does not materially change the law upon this subject, and postpone the lien upon the property until it is actually seized on the execution, may admit of grave doubt. If that be the effect of the statute, then even if the money had remained in the hands of the sheriff, when an application was made to apply it on the execution in favor of the respondent, the court would not so have applied it.

It follows from these views that the judgment of the circuit court must be reversed, and a new trial ordered.

SHERIFF, WHEN LIABLE FOR ACTS OF HIS DEPUTY: See *Whitney v. Butterfield*, 73 Am. Dec. 584, note 589, where other cases are collected.

THE PRINCIPAL CASE IS CITED IN *Knox v. Webster*, 18 Wis. 409, to the point that under the Wisconsin statute, a judgment creditor has no lien upon personal property of the debtor until it is seized on execution. This lien takes effect from the date of the levy, and by virtue thereof, and is confined to the execution levied. It is prior and superior to that of every execution subsequently levied, and consequently not liable to be defeated by such subsequent levy, though made upon a senior execution. It is also cited in *Ohlson v. Pierce*, 55 Id. 213, to the point that it is the duty of the sheriff to levy executions in the order of time.

COTTON v. SHARPSTEIN.

[14 WISCONSIN, 226.]

ATTORNEY AT LAW EMPLOYED TO COLLECT CLAIM, WHO AFTER COLLECTING IT CONVERTS PROCEEDS thereof to his own use, is liable to be arrested and held to bail in a civil action.

ATTORNEY AT LAW IS MERELY AGENT OF HIS CLIENT, and the title to the property which he collects is in the client, and not in him. He is, therefore, liable to an action of trover for the conversion of that property, with all the legal consequences of such an action, among which is an execution against the body.

AGENT IS LIABLE IN TROVER FOR CONVERTING MONEY OF HIS PRINCIPAL to his own use, in the absence of any authority on the part of the agent to treat the money collected by him as his own, and to consider himself the absolute debtor of the principal for the amount.

APPEAL from the county court of Milwaukee. The complaint alleged that the plaintiff employed the defendant, who was an attorney at law, to collect certain money for him. That the defendant collected the money, but though often requested, refused to account for or pay the same to the plaintiff. The second count alleged that the plaintiff employed the defendant to prosecute a certain action for him; that judgment was rendered therein for the plaintiff; that defendant Sharpstein caused an execution to be issued on that judgment, and at the execution sale bid off certain real estate of the judgment debtor; that Sharpstein paid no money thereon, but took the certificate of sale in his own name, and afterwards assigned the certificate and converted the proceeds to his own use. Upon affidavits tending to show the truth of the matters alleged in the complaint, an order was made by a court commissioner for the arrest of the defendant, and he was arrested. The county judge made an order vacating the order of arrest, upon the ground that the defendant was entitled to exemption under the constitution of the state. The plaintiff appealed from this order. Other facts appear from the opinion.

J. E. Arnold, for the appellant.

Butler, Buttrick, and Cottrell, for the respondent.

By Court, **PAINE, J.** This appeal presents the question whether an attorney who has been employed to collect a claim, and who after collecting it converts the proceeds to his own use, is liable to be arrested and held to bail in a civil action. For whether or not the first count in the complaint accurately alleges a conversion, the second count expressly does so, and the question was decided by the court below, not upon any in-

sufficiency in pleading a conversion, but upon the broad ground that by reason of the relation between attorney and client the claim sought to be recovered was one founded upon or growing out of a contract, and therefore, under our constitution, which prohibits imprisonment for debts of that character, the defendant was not liable to arrest. This question has already been passed upon by this court, and we have held that where a party has been guilty of a tortious conversion of property he is liable to an action of tort, and to all the consequences of such an action, among which is an execution against the body, notwithstanding he may have had a contract with the owner of such property in relation thereto, which he also violated by such conversion: *In re Mowry*, 12 Wis. 52. It is, perhaps, unnecessary to add anything to what is there said upon this point. But I will say that the question of liability to arrest seems to me to depend entirely, in such cases, upon the one whether the party is liable to an action of trover or tort. If he is, then all the incidents to and results of such an action would seem necessarily to follow. For there can be no solid reason for saying, because the plaintiff might also have had a remedy in an action on the contract, that therefore his action of trover, to which he is also entitled, shall be shorn of a part of its ordinary incidents, and turned substantially into a remedy *ex contractu*. The only manner in which the existence of a contract in such cases can legitimately affect the right to an action of trover would be by prohibiting it entirely. And such is its effect where the plaintiff can only sustain his action by a resort to the obligation imposed by the contract. But nothing is more familiar than that a party having possession of property under a contract for a special purpose may tortiously convert it to his own use, and render himself liable to an action of trover. The books are full of such cases. And they are based upon the plain proposition that a party, by entering into a contract with the owner in respect to property, does not thereby incapacitate himself from wrongfully invading the rights of the owner which exist independent of the contract. And if he does so invade them, the owner's right of action is not founded upon the contract, but upon the tort, and could be sustained whether the contract existed or not.

If I contract with another to keep and take care of my horse, and he neglects to do it, so that the horse is injured, my only remedy is an action on the contract. He was under no obligation to keep my horse, except that imposed on him

by the contract. And to sustain my action, I should have to rely on that obligation. But if he should kill or sell my horse, although that would also be a violation of the contract, it would be something more. It would be an invasion of my right of property, which I did not have by virtue of the contract, and which he was under obligations to respect without reference to the existence of the contract. Therefore it is a tort, and I may maintain trover, simply because I do not have to rely upon the contract at all to sustain my right. Hence all that class of cases which sustain the right to an action of trover upon such facts are authorities against the position that the claim sought to be recovered in such an action is a "debt arising out of or founded upon a contract." If it were such a debt, then the action of trover could not be sustained.

There is a class of cases very forcibly illustrating the position that in such instances the right of action does not depend at all on the contract, by holding that even though the contract be illegal and void as against public policy, still the owner may recover for a wrongful invasion of his right of property existing independent of the contract. A very well-reasoned case of this description is that of *Woodman v. Hubbard*, 25 N. H. 67 [57 Am. Dec. 310]. There a horse was hired to go to a particular place, but was driven beyond that place and injured. The court held, as has been often held, that it was a conversion. The defense was set up that the contract of hiring was made on Sunday, and was therefore illegal; but the court said that although illegal, that would not defeat the right of action, because this did not depend at all on the contract. This conclusion seems entirely in harmony with the result of the class of cases already referred to, which allow an action of trover upon such facts, where no question is made as to the legality of the contract. The contract being valid, trover is sustained, because the right of action is not founded on the contract, but on the tort. It would, therefore, follow that even though the contract were illegal, that ought not to defeat the action of trover. I think the reasoning of that case much preferable to that of *Gregg v. Wyman*, 4 Cush. 322, which is referred to in it, and which held an opposite doctrine.

The same conclusion also results from that class of cases which hold an infant liable for the conversion of property, though he may have had a contract in respect to such property, which he also violated. So far as the remedy on the contract was concerned, he could avoid it by his infancy. But

for the tort he is held liable, as the right of action did not rest upon the contract: *Homer v. Thwing*, 3 Pick. 492; *Vasse v. Smith*, 6 Cranch, 231; *Campbell v. Stakes*, 2 Wend. 143, 144 [19 Am. Dec. 561].

The doctrine, therefore, which was acted on in *In re Mowry* 12 Wis. 52, and which is supported by the foregoing considerations, would seem to settle the question presented here in favor of the defendant's liability to arrest, unless the fact that he was an attorney creates an exception. We can see no reason why it should. On the contrary, we fully concur in the remark of the court in *Bredin v. Kingland*, 4 Watts, 422, quoted by the respondent's counsel, that "there is no distinction in reason between an attorney at law and an attorney in fact." An attorney at law is an agent—nothing more. The title to property which he collects for his principal is in the principal, and not in him. And he should be liable to an action for the conversion of that property in the same manner that any other agent would be.

The relation of attorney and client is undoubtedly founded upon a contract. The attorney would be liable to account, and to an action for negligence in performing his duties. This is all the respondent's authorities go to show, and this is readily conceded. But it by no means follows that he would not be liable also in trover if he converted the property of his principal, or that such an action would be for a debt founded on the contract. That agents are so liable for a conversion, and the distinction between actions for the tort and actions on the contract are well established: *Paley on Agency*, 78; *Story on Bailments*, sec. 191; *McMorris v. Simpson*, 21 Wend. 610. There would seem to be really no room for questioning the liability of an attorney to an action of trover for converting any other property besides money, which he had collected for his employer. Suppose he should, by direction of his principal, receive payment in horses or cattle, and without authority should sell or convert them to his own use, could it be said that he would not be liable in trover? Could it be said that an action for such conversion was for a debt founded on contract? It seems clearly not. And without relying necessarily upon the position that an attorney would be liable in trover for money which he had collected and refused to pay over, we think the second cause of action stated in the complaint is good, for a conversion of the marshal's certificate. It shows that the defendant, having recovered a judgment for the plain-

tiff, on which the judgment debtor's land was sold, bid off the land for the judgment, and instead of taking the certificate in the plaintiff's name, took it in his own name, and afterwards sold it and appropriated the proceeds to his own use. This would seem to be clearly a conversion of the certificate, which should have been taken in the plaintiff's name, and which, having been taken in the defendant's name, the plaintiff was entitled to have transferred to him. The defendant had no authority, by virtue merely of his position as attorney, to sell the certificate to anybody else. And an unauthorized sale is a conversion: *Etter v. Bailey*, 8 Pa. St. 443; Story on Agency, sec. 437. The sale of the certificate seems entirely similar in its character to the act of the defendant in the case of *McNear v. Atwood*, 17 Me. 434, who was authorized to receive a note for his principal, and instead of taking it payable to his principal took it payable to himself, and negotiated it for his own use. He was held liable in trover for a conversion of the note. So in *Hogg v. Snaith*, 1 Taunt. 347, it was held that an attorney having power to collect and receive his principal's salary had no power to negotiate bills received in payment: See also *Wilson v. Wadleigh*, 36 Me. 499; *Wilson v. Jennings*, 3 Ohio St. 528.

In relation to the cause of action first stated in the complaint, it may be doubtful whether it was intended to charge a conversion of the money, or to proceed on the contract for not accounting. It does not aver that the defendant had converted the money to his own use, but it does aver that he had refused to pay it over on demand. This, though perhaps not a sufficient allegation of conversion, would be sufficient evidence of one, provided an action of trover can be maintained against an agent for converting the money of his principal to his own use. Whether such an action can be sustained is a question not without difficulty, or at least is one which may give rise to difficulty in its practical application, assuming that the action can be sustained. That it can be sustained under some circumstances seems to us to result necessarily from well-established principles. Thus there can be no doubt that the title to money which an agent has collected for his principal, at least so long as its identity can be established, is in the principal, and not in the agent: Story on Agency, sec. 229; Paley on Agency, 95. Suppose, then, an attorney employed to collect a claim should receive in payment a box of specie, or a package of bills, and while it was thus separate,

the principal should demand its delivery, and the attorney should absolutely refuse to pay it over. Can there be any reason why he should not be liable in trover, any more than why any other agent should not, who refuses to deliver any other kind of property when bound to do so? We can see none. The case would be no stronger if we assumed that the agent actually expended the money for his own use. The idea that he would not be liable in either case can be justified only upon the theory that the title to the money is in him, and not in his employer. But this, as we have already seen, is not so. The money, when collected, does not become his own, and he is a mere debtor of his client for that amount, but the title to the money is in the client. This rule is necessary frequently both for the protection of the attorney and the client. If it were not so, if an attorney, having collected money, should die with it in his hands, though he has no other, the principal, being only a creditor, would have to come in and share with other creditors in the very money which was collected for him. On the other hand, though the attorney should use all care and diligence in keeping the money, if it should be lost or destroyed without his fault, being only a debtor to his principal, the loss would be his, and he would still owe the debt. But neither of these things is so. In the one case, on the death of the agent, the money, being identified, would belong to the principal; in the other, the agent having used due diligence in keeping his principal's property, the loss would fall on the principal, and not on him. We can see no reason, then, so long as the identity of the money and its conversion are clearly established, why it should be governed by any other rule than the conversion of any other property.

But a difficulty in applying this rule may arise from the facility with which money is mingled with other money, and the habit which undoubtedly prevails quite extensively among those who collect money for others, of mingling it with their own, so that it can no longer be identified. It is admitted that where this is done, it can no longer be followed and specifically recovered. And it may, perhaps, well be said that where, by the course of dealing between the parties, the agent has been accustomed to treat the money collected as his own, and to consider himself the absolute debtor of the principal for the amount, which practice has been recognized by the principal, an authority for that purpose might be fairly implied which would protect the agent from liability for convert-

ing the money of his principal to his own use. Undoubtedly, such an authority might frequently be inferred from the course of dealing. But in the absence of any such, I am unable to discover any reasoning which should shield an agent from liability in trover for converting the money of his principal to his own use. For if right in saying that when the money he has received is in a distinct parcel, and is demanded by the owner, and he refuses to deliver, he would be liable in trover, could he, by mingling the money with his own, without any authority, and then refusing to pay it over, place himself in any better position? It would seem difficult to support such a proposition by any satisfactory reasoning. In cases where the agent so mingles the money of his principal with his own, yet on demand pays the amount due to his principal, the question whether he had technically converted any part of the identical money he had received would be of no practical importance, inasmuch as the principal would get the amount belonging to him. But when he so mingles them without authority, and then refuses to pay, I am unable to see why such refusal should not be just as much evidence of a conversion as though the money were still in a separate parcel. The only difficulty growing out of the nature of money is, as some of the cases have said, a difficulty of fact, and not of law. In law, the rights of the parties in respect to the money are the same as in respect to any other property. The only difference is that the identity of money is more easily destroyed than that of other property, and where the agent has so destroyed it, it can no longer be specifically recovered; not because the right no longer exists, but because of the difficulty in fact. But this difficulty does not exist in respect to the question of the liability of the agent for the conversion. So far as that is concerned, there is no more difficulty in showing its conversion than in showing the conversion of any other property. And that being so, it would follow that the agent should be held liable for converting it, upon the same principle that he would be for converting any other.

In *Stott v. Alexander*, 2 Sneed, 650, it is assumed that trover may be sustained by an administrator *de bonis non*, for money of the intestate which came into the hands of the executor of the former administrator, though the action failed for want of proof of the identity of the money. In *Ringo v. Field*, 6 Ark. 43, the defendant, as agent of the plaintiff, had collected a sum of money, which was paid in a box of specie, and was

deposited by the agent in a bank, and the certificate taken in his own name. The court say, page 49: "The custody of the box by the agent was the possession of the principal. The defendant was, as such agent, authorized to receive it for the principal and pay it over to him. The depositing of it in the bank, whether as a general or special deposit, and taking the certificate therefor in his own name, were acts from which the jury were authorized to find a conversion. If the deposit was general, it became thereby transferred into a mere debt, the legal title to which was in the defendant, and this would have been of itself a conversion. On the other hand, a special deposit of it in the defendant's own name was at least evidence of a conversion." In the case of *An Attorney*, 30 Eng. L. & Eq. 390; funds had been sent to an attorney to invest and apply the proceeds in carrying on a divorce suit. He deposited them in his own name, and used the money. Lord Campbell said: "Those bills were chattels sent to him to be applied to a specific purpose for the benefit of the client, and he could not honestly mix the proceeds of those bills with his own proper money." And again: "Unless there was some evidence of condonation on the part of the client, we cannot treat this as a case of mere debt."

We have found no case where the exact question now under discussion has been decided. But we are satisfied that it is the clear result of principles well established, that it is the duty of an agent to keep money collected by him, for the principal to whom it belongs, and that if, in the absence of any authority, express or implied, to treat it as his own, and himself as a mere debtor, he wrongfully converts it to his own use, he is liable to an action of trover, and to all the legal consequences of such an action.

It was said in the opinion of the court below, that in the constitutions of other states, in the clause prohibiting imprisonment for debt, an exception was inserted excluding persons acting in a fiduciary capacity; and it was claimed that as no such exception is contained in our constitution, no such exception could be made in fact. This argument is undoubtedly correct as to all debts of persons acting in a fiduciary capacity, which are founded upon contract. But it does not follow that the want of such an exception would prevent persons acting in a fiduciary capacity from arrest and imprisonment for a tortious conversion of property, even though such tort might also be a violation of their trusts. For, as has already

been attempted to be shown, such an action is not for a "debt arising upon contract" at all, but is for damages for a tort.

It may be that some persons acting in a fiduciary capacity, such as executors, administrators, and trustees of express trusts, might not be liable in an action of trover for a conversion, for the reason that the legal title to the property was in them. The exception referred to may have been introduced in other constitutions for the purpose of reaching such cases. But we think no such exception is necessary in any case where the party is liable to an action of trover, one of the established incidents of which is an execution against the body.

And there is nothing in *In re Blair*, 4 Wis. 522, in conflict with this conclusion. There the party was liable only on a judgment which had been recovered in another state, which was clearly a debt arising on a contract, and within the prohibition of our constitution.

The order appealed from must be reversed, with costs.

THE PRINCIPAL CASE IS CITED TO THESE POINTS in the following cases: The imprisonment of a defendant under an execution issued in an action for tort is not an imprisonment "for debt arising out of, or founded on, a contract," within the meaning of section 16 of article 1 of the constitution of Wisconsin: *Baker v. State*, 54 Wis. 378; *Toal v. Clapp*, 64 Id. 227. When the plaintiff, in his complaint, sets out unlawful and tortious acts of the defendant, and relies upon those acts as the foundation of his right to demand that the court shall adjudge that the plaintiff recover of the defendant money unlawfully taken from him by such unlawful and tortious acts, the action is clearly an action sounding in tort, although under the old practice he might have declared in *assumpsit* for money had and received, and have recovered upon proof of the same facts set out in the complaint: *Schemmert v. Kaehler*, 23 Id. 527; *Sutton v. Town of Wauwatosa*, 29 Id. 28; *Graham v. Chicago etc. R'y Co.*, 53 Id. 483. The practice of arresting on mesne process, or at any time before judgment in an action of tort, upon the order of the judge of the court, is continued by law in Wisconsin: *In re Kindling*, 39 Id. 60. It is also referred to in *Supervisors of Kewaunee Co. v. Decker*, 30 Id. 635, as having stated as a *quære* whether a count alleging merely that the defendant had collected certain money for the plaintiff, as his attorney at law, and had not, though often requested, accounted for or paid it to the plaintiff, contained a sufficient allegation of conversion.

HILL v. LA CROSSE AND MILWAUKEE R. R. Co

[14 WISCONSIN, 291.]

MONEYS COLLECTED BY SHERIFF UPON EXECUTION CANNOT BE GARNISHED IN HIS HANDS or seized on an attachment in favor of a creditor of the execution plaintiff, and particularly where such creditor is the sheriff himself.

APPEAL from the circuit court for Milwaukee county. The opinion states the case.

James G. Jenkins, for the appellant.

L. Hubbell and E. Mariner, for the respondents.

By Court, **COLE, J.** The appellant, who was sheriff of Milwaukee county, collected upon an execution placed in his hands, which was issued upon a judgment in favor of the respondents and against the La Crosse and Milwaukee Railroad Company, about the sum of thirteen thousand four hundred dollars, the amount due thereon. He paid over to the assignee of the judgment the amount which he had collected, less the sum of four thousand five hundred and nineteen dollars and seventy-four cents, which, it appears from his return and the writ of attachment thereto annexed, has been seized and attached in his hands by the coroner on a writ of attachment issued out of the circuit court of Milwaukee county in favor of the sheriff and against the plaintiffs in the execution. Steps were taken to compel the sheriff to return the execution, and finally the circuit court ordered that the sheriff pay into court within five days the balance of the money collected upon the execution, and in default of his so doing, that he be attached as for a contempt of the order of the court. From this latter order the sheriff has appealed. A majority of the court think this order must be affirmed.

We place our decision upon the broad ground that moneys in the hands of a sheriff, collected by him upon an execution, cannot be seized on attachment or garnished by a third party, a creditor of the plaintiff in execution. For a stronger reason, they cannot be seized or garnished in his hands in an attachment proceeding in favor of the sheriff himself.

We are well aware that there is some conflict of decisions upon this question among the courts of our sister states, arising upon statutes not essentially different and substantially like our own. But we think the weight of authority and force of argument are in support of the rule which we adopt: See

the following authorities: 1 Com. Dig., tit. Attachment, D; *Turner v. Fendall*, 1 Cranch, 117; *Staples v. Staples*, 4 Me. 532; *Sharp v. Clark*, 2 Mass. 91; *Wilder v. Bailey*, 3 Id. 289; *Polard v. Ross*, 5 Id. 319; *Thompson v. Brown*, 17 Pick. 462; *Dubois v. Dubois*, 6 Cow. 494; *Farmers' Bank of Delaware v. Beaston*, 7 Gill & J. 421 [28 Am. Dec. 226]; *Jones v. Jones*, 1 Bland Ch. 443 [18 Am. Dec. 327]; *Alston v. Clay*, 2 Hayw. 360; *Blair v. Canteley*, 2 Speers, 34 [42 Am. Dec. 360]; *Burrill v. Letson*, Id. 378; S. C., 1 Strobb. 239; *First v. Miller*, 4 Bibb, 311; *Dawson v. Holcomb*, 1 Ohio, 275 [13 Am. Dec. 618]; *Drans v. McGavock*, 7 Humph. 132; *Marvin v. Hawley*, 9 Mo. 378 [43 Am. Dec. 547]; *Reddick v. Smith*, 3 Scam. 451; *Clymer v. Willis*, 3 Cal. 363 [58 Am. Dec. 514]; *contra: Hurlbut v. Hicks*, 17 Vt. 193 [44 Am. Dec. 329]; *Stebbins v. Peeler*, 29 Id. 289; *Woodbridge v. Morse*, 5 N. H. 519; *Crane v. Freese*, 1 Harr. 305.

It is true that courts which have denied that moneys held by a sheriff in his official capacity could be reached by levy or attachment proceedings have not always assigned the same reasons or stated the same grounds for their decisions. Some have said that money thus in the hands of the sheriff was in the custody of the law, and therefore could not be attached; others that it was not the property of the execution creditor until paid over; others that the statutes do not refer to officers holding money in an official capacity, but to persons who, by their voluntary agency, have taken possession of the goods and effects of the debtor, or have become indebted to him on contract; while others place their decisions on grounds of public policy, to save officers from litigation and expense in answering to the many garnishee suits which might be commenced against them.

Without dwelling upon these reasons, or attempting to fortify them by argument, we will say that there is one consideration for exempting money in the hands of a sheriff from levy or attachment, which to our minds is very cogent, and which is well presented by the court in the case of *Marvin v. Hawley*, 9 Mo. 378 [43 Am. Dec. 547]. The court there say: "If the practice of garnishing the sheriff for money in his hands received on execution were tolerated, it would not only greatly interrupt the due and speedy administration of the law, and prevent the courts from consummating their judgments, but it would involve the ministerial officers of the courts in interminable difficulties and delay in the discharge of their duties."

It appears to us that there is much force in these observations. The ordinary duties of sheriffs are frequently arduous and responsible. They would be much more so if they were liable to be drawn off to every part of the county to answer as garnishees in the numerous cases which might be commenced before justices of the peace. It might be said that they would recover costs, but this would be a very inadequate compensation for the expenses incurred, while at times the practice would inevitably hinder and delay the sheriff in the discharge of those duties connected with the administration of the civil and criminal law of the state. We therefore think the sheriff, having the official possession of moneys collected upon execution, should be exempt from having the same attached or garnished.

The order of the circuit court is affirmed.

DIXON, C. J., dissented.

MUNICIPAL CORPORATION IS NOT LIABLE TO GARNISHMENT: See *Mayor etc. of Baltimore v. Root*, 63 Am. Dec. 692, note 699, where other cases are collected: *Merrell v. Campbell*, 49 Wis. 536, citing the principal case.

SHERIFFS AND OTHER SIMILAR OFFICERS ARE NOT LIABLE TO GARNISHMENT for moneys in their hands as such officers: *Burnham v. City of Fond du Lac*, 15 Wis. 194; *J. I. Case Threshing Machine Co. v. Miracle*, 54 Id. 299, both citing the principal case.

GRANT v. LEWIS.

[14 WISCONSIN, 487.]

AS GENERAL RULE, DECLARATIONS OF VENDOR MADE AFTER HE HAS PARTED WITH HIS TITLE are not admissible in evidence to affect the title of the vendee; but where the vendor of the goods remains in the actual possession of them, his statements explanatory of such possession, and of the relation which he then holds to the property, are admissible for the purpose of showing fraud in the sale, if they have that tendency.

RETENTION OF POSSESSION OF GOODS BY VENDOR IS PRESUMPTIVE EVIDENCE of fraud, and the burden of rebutting this presumption, and of showing by satisfactory evidence that there was really no intent to defraud, is cast upon the purchaser.

WHERE VENDOR OF GOODS MAKES ARRANGEMENT WITH VENDEE, by which the former shall have the privilege of reclaiming them upon payment of the amount of a claim which the vendee holds against him, such arrangement will create a trust for the benefit of the vendor, and render the sale void as to creditors, if the value of the goods exceeds the amount of such claim. But if the value of the goods did not exceed the amount of the vendee's claim, it is doubtful whether the reservation of the right to buy them back at their full value would constitute such a benefit to the vendor as to avoid the sale.

WHERE VENDOR OF GOODS RETAINS POSSESSION THEREOF NOMINALLY AS AGENT OF VENDEE, but with the right to sell and have all he can make beyond the actual cost, that is such an interest reserved as is utterly inconsistent with good faith in the sale, as against his creditors.

APPEAL from the circuit court for Crawford county. The following instructions given by the court were excepted to by the defendants: "1. That the several matters given in evidence on the part of the defendants were not sufficient, in law, to bar the plaintiff of his action; 2. That if the jury believed from the evidence that the plaintiff, at or about the time he purchased of Ammon the goods and chattels in controversy, made an arrangement with said Ammon whereby the latter was to have the privilege of selling said goods and chattels as agent, and reserve to himself all the avails of said goods and chattels over and above the cost price of the same, with the expense of transportation added, as a commission for services in selling, that state of facts did not constitute the plaintiff a trustee for the benefit of Ammon, so as to make the sale fraudulent and void as to Ammon's creditors." The other facts appear from the opinion.

L. Wyman, for the appellants.

O. B. Thomas, for the respondent.

By Court, **PAINE, J.** This was an action brought for the alleged wrongful taking and detention of a stock of goods. The plaintiff claimed them under a sale from Ammon, and the defendants had seized them upon an attachment against the goods of Ammon, issued in favor of some of his creditors subsequently to the sale. The material question upon the trial was, whether the sale to the plaintiff was fraudulent and void as against Ammon's creditors?

It appeared that Ammon was left in possession of the goods, and the defendants, to show fraud in the sale, offered in evidence his declarations just preceding the levy in respect to the character of the transfer from him to the plaintiff. This was rejected by the court, which we think was error.

The general rule is, it is true, that the declarations of a vendor, made after he has parted with his title, are not admissible in evidence to affect the title of the vendee. But an exception to this rule is so far established, that where the vendor remains in the actual possession of the goods, his statements explanatory of such possession, and of the relation which he then holds to the property, are admissible as original evidence, and for

the purpose of showing fraud in the sale, if they have that tendency: 1 Phill. Ev., Cowen, Hill, and Edwards's Notes, 4th Am. ed., p. 197; *Carnahan v. Wood*, 2 Swan, 502. The case of *Donaldson v. Johnson*, 2 Chand. 160, decided that in the case of a chattel mortgage, the declarations of the mortgagor, made after the filing of the mortgage, although he was in possession of the property, were not admissible. But the decision was expressly placed upon the ground that the filing was made equivalent to a change of the possession, and the opinion clearly implies that in the case of an absolute sale, where the vendor is left in possession, his declarations concerning that possession and the nature of his right would be evidence.

The court below also erred in refusing several of the instructions asked for by the defendants' counsel. They asked, among others, the following: "In this case, the plaintiff must show by satisfactory proof on his part, that the sale by Ammon to him was made in good faith and without any intent to defraud creditors." There can be no doubt, upon the evidence, that this instruction should have been given. All the witnesses who testified on the subject stated that Ammon was left in the actual possession of the property sold. It is true, the plaintiff offered evidence tending to show that he continued in such possession as the plaintiff's agent. But even if that were really so, and the sale made in good faith, yet that is not such an "actual" change of possession as the statute contemplates, in order to rebut the presumption of fraud. It means such a change that the vendor ceases to possess the goods in any capacity whatever. There may undoubtedly be an honest sale, and the vendor left in possession in good faith as the vendee's agent. But it looks so much the other way on the face of it, without explanation, that the statute makes the mere fact of the continued possession of the vendor presumptive evidence of fraud, and conclusive, unless the purchaser shows by satisfactory evidence that there was really no intent to defraud, that burden being thrown upon him: R. S., c. 107, sec. 5; *Camp v. Camp*, 2 Hill (N. Y.), 628; *Hanford v. Archer*, 4 Id. 297. The instruction asked was therefore nothing more than the statute plainly provides for.

A number of other instructions were asked for, and seem to have been uniformly refused. They relate principally to the evidence tending, as was claimed, to show a secret trust reserved for the benefit of Ammon. Among others, the following was asked: "If the jury believe from the testimony that it was

a secret part of the arrangement at the time of the sale from Ammon to the plaintiff, that Ammon was to have the privilege of paying Grant the amount of his claim, and have the goods back again, such agreement or arrangement would create a trust for the benefit of Ammon, and [render] the sale from Ammon to the plaintiff void as to creditors."

The correctness of this instruction would seem to depend upon the question whether the goods were of a greater value than the amount of Grant's claim. If they were, then such a provision in the contract would undoubtedly reserve to the vendor a beneficial interest. Assuming that the goods were of the value at which they were invoiced, which was something over three thousand five hundred dollars, Grant's claim being only about two thousand six hundred dollars—the right reserved in the sale by the vendor to have the goods again on paying the claim would clearly be a beneficial right to the amount of the excess of value over and above the debt. Such a transfer would be very similar in its nature to a mortgage where the mortgaged property exceeded the value of the debt secured. But there was some evidence tending to show that the real value of the goods was no greater than the plaintiff's claim, and if the jury had so found, then it is very doubtful whether the reserved right of buying them back at their full value would constitute such a benefit to the vendor as to avoid the sale. The court was, therefore, right in refusing this instruction in the absolute form in which it was drawn.

But the defendants also asked the following: "If the jury believe from the testimony that Ammon was to sell the goods and account to the plaintiff at the price which they cost, or the invoice price, and to retain all he could sell them for over and above that price, that would constitute a secret trust in law, and [render] the sale from Ammon to the plaintiff void as to creditors, and the verdict must, therefore, be for the defendant." It seems very clear that, upon the facts assumed in this instruction, Ammon would have reserved to himself the entire profits to be derived from conducting the business. It may be that an employer may pay an agent by giving him what he can sell for beyond a given price. But where a vendor is retained nominally as the agent of the vendee, but with a right to sell and have all he can make beyond the actual cost, that is such an interest reserved as is utterly inconsistent with good faith in the sale.

We do not consider it necessary to notice in detail all the

instructions that were asked and refused, as what we have already said will sufficiently indicate the views of this court in regard to the law applicable to the case.

The judgment is reversed, with costs, and a new trial ordered.

DECLARATIONS MADE BY PARTY AFTER HE HAS CONVEYED his property are not admissible in evidence to prove the conveyance fraudulent as to his creditors: *Burt v. McKinstry*, 77 Am. Dec. 507, note 514, where other cases are collected. The declarations, to be admissible, must have been made when he was in possession: *Selsby v. Redlon*, 19 Wis. 19, citing the principal case. Declarations made by an assignor after the assignment of a claim are not admissible in evidence against his assignee: *Welch v. Town of Sugar Creek*, 28 Id. 624, citing the principal case.

RETENTION OF POSSESSION AS EVIDENCE OF FRAUD IN SALE OF GOODS: See *Stevens v. Irwin*, 76 Am. Dec. 500, note 504, where other cases are collected. If property is left in the possession of the vendor as the agent of the vendee, or in any other capacity whatever, there is no such actual change of the possession as the Wisconsin statute contemplates in order to rebut the presumption of fraud: *Manufacturers' Bank of Milwaukee v. Ruges*, 59 Wis. 226, citing the principal case. But acts of ownership and statements by a vendor remaining in possession, explanatory of his possession, may be given in evidence, even against his vendee: *Knapp v. Schneider*, 24 Id. 73, also citing the principal case.

WICKMAN v. ROBINSON.

[14 WISCONSIN, 493.]

ONE WHO HAS MADE CONTRACT FOR PURCHASE OF REAL ESTATE, AND PAID PART of the purchase-money, has an equitable lien on the land for the amount paid, where the completion of the contract is prevented by the default or wrongful act of the vendor. The vendee in such a case is entitled to a judgment for the sale of the land to make the amount due to him, his lien being in the nature of a mortgage. And where the contract is recorded, the lien will be enforced against the land in the hands of a subsequent purchaser.

WHERE LAND AGREED TO BE CONVEYED IS TO BE PAID FOR IN SERVICES, and the vendor refuses to perform his agreement after the vendee has performed part of his contract, the amount for which the latter will have a lien thereon is the value of the services actually performed, estimated according to the contract price.

APPEAL from the circuit court for Dane county. The complaint alleged that the defendant Robinson agreed, in writing, under seal, to convey to the plaintiff a tract of land in return for certain work to be performed by the latter during a period of five years; that the amount agreed to be paid for said services was five hundred dollars; that after the plaintiff had worked under the contract two years and a half, Robinson

refused to permit him to proceed further under the agreement; that the value of the services performed was three hundred dollars; that Robinson had, after the recording of the agreement, conveyed to the defendant McBride the forty acres of land which he had agreed to convey to the plaintiff, and had become insolvent; and that the plaintiff had never consented to a rescission of the contract, and would not consent to it until his claim should be paid. The complaint prayed that the sum of three hundred dollars, with interest, might be declared a lien upon said tract of land, and that it be decreed to be sold for its payment. The defendants demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and the circuit court sustained the demurrer. Other facts are stated in the opinion.

Julius T. Clark, for the appellant.

Welch and Lamb, for the respondents.

By Court, PAINE, J. This appeal presents the question whether one who has made a contract for the purchase of real estate, and has paid part of the purchase-money, has an equitable lien on the land for the amount paid, in case a completion of the contract is prevented by the default or wrongful act of the vendor. It must be conceded that there are not many cases where such a right has been sought to be enforced, but the right itself has been frequently recognized by courts, and referred to as established by elementary writers. The following, cited by the appellant's counsel, may serve as illustrations: *Burgess v. Wheate*, 1 W. Black. 150; *Mackreth v. Symmons*, 15 Ves. 345; *Money v. Dorsey*, 7 Smed. & M. 22; *Payne v. Atterbury*, Harr. (Mich.) 418; *Willis v. Farrar*, 3 You. & J. 264; *Miller on Equitable Mortgages*, 45 Law Lib. 18, 19.

We can see no reason why such a lien should not exist. All the reasoning by which the vendor's equitable lien for the purchase-money, after conveyance, is established, is applicable in support of the vendee's lien after payment or part payment, and before conveyance. It is difficult to image upon what principle a court of equity could enforce the one and deny the other. It is undoubtedly true that the more usual remedy is to enforce a specific performance. But in cases like the present, where the payment is to be made by the performance of particular services for the vendor, and after they are partly performed he refuses to allow them to be completed, it may be doubtful whether a specific performance could be enforced by

the vendee; whether he would not be limited to his damages for the non-performance. However that may be, we are satisfied that it is the clear result of equitable principles, that if he chooses to waive every right except the recovery of that which he has paid, he should be held to have a lien on the land for that amount.

The amount to be paid, in a case like this, would be the value of the services actually performed, estimated according to the contract price. The contract having been recorded, the plaintiff is entitled to the same remedy as against the purchaser that he would have if no conveyance had been made: *In re Howe*, 1 Paige, 129; *Keirsted v. Avery*, 4 Id. 9; *Hoagland v. Latourette*, 1 Green's Ch. 256. That remedy is by a sale of the property to collect the amount due, it being in the nature of a foreclosure: 2 Story's Eq. Jur., sec. 1217.

The demurrer to the complaint should have been overruled. The judgment is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

VENDOR'S LIEN, ENFORCEMENT OF IN EQUITY: See *Dibblee v. Mitchell*, 77 Am. Dec. 99, note 101, where other cases are collected. A purchaser who has advanced any portion of the purchase-money has an equitable lien on the land as security, where the contract is rescinded on the default of the vendor: *Taft v. Kessel*, 16 Wis. 279, citing the principal case.

FORD v. CHICAGO AND NORTH WESTERN R. R. Co.

[14 WISCONSIN, 602.]

OWNER OF LOT BOUNDED BY PUBLIC STREET WITHIN RECORDED TOWN PLAT OR VILLAGE TAKES TO CENTER of the street, and owns the soil subject to the public easement.

RAILROAD COMPANY CANNOT APPROPRIATE AND OCCUPY PUBLIC STREET with the track of its road, without the consent of the proprietors of lots bounded by such street, or without compensation made to them, and neither the legislature nor the municipal authorities have any power to dispense with the making of such compensation.

RAILROAD COMPANY MAY BE RESTRAINED BY INJUNCTION FROM LAYING ITS TRACK IN PUBLIC STREET, without first taking steps to acquire the right of way by the assessment and payment of damages to the owners of lots bounded by the street.

WHETHER LAND SELECTED BY RAILROAD COMPANY FOR ITS TRACK IS NECESSARY for its use, or whether other lands adjoining cannot be as conveniently occupied for that purpose, is not a judicial question to be determined by the court, but is a question of discretion to be determined by the company, proceeding in the manner prescribed by law.

PAST DAMAGES CAUSED TO OWNER OF LOT BY RAILROAD COMPANY'S TEARING UP STREET, without making compensation, may be assessed by the court or by a jury; but the permanent damages which will accrue to the owner by the continued use of the land by the company can only be ascertained in the manner prescribed by the statute.

APPEAL from Winnebago county court. The action was brought by the owner of certain lots on Broad street, in the city of Oshkosh, to recover damages caused by the construction of the defendant's road in front of his lots, and for an injunction to restrain the defendant from laying its track in said street. The court held that the plaintiff was entitled to the perpetual injunction asked for, and that he was entitled to recover the damages already sustained by him. The plaintiff waived all but nominal damages. Other facts appear from the opinion.

Bouck and Edmonds, for the appellant.

N. L. Whittemore and H. L. Palmer, for the respondent.

By Court, DIXON, C. J. However much we might be inclined to yield to the argument of counsel were the question a new one, it is too well settled to allow it now to be drawn in dispute before this court, that the proprietors of lots bounded by a public street within a recorded town plat or village take to the center of the street, and own the soil, subject to the public easement: *Kimball v. Kenosha*, 4 Wis. 321; *Goodall v. Milwaukee*, 5 Id. 32; *Milwaukee v. Mil. and Beloit R. R. Co.*, 7 Id. 85; *Mariner v. Schulte*, 13 Id. 692.

Upon questions of this nature, we shall make no attempt to produce new arguments to sustain or overthrow our own decisions already made. Our intention is to rest on them, as far as they go, as absolute and incontrovertible authorities.

It being established that the proprietor of the adjacent lot owns to the center of the street, subject only to the right of the public to occupy and use the land as an ordinary highway, the conclusion of the court of appeals in *Williams v. New York Central R. R. Co.*, 16 N. Y. 97 [69 Am. Dec. 651], that a railroad company cannot appropriate and occupy it with the track of its road without the consent of such proprietor, or without compensation made to him, and that neither the legislature nor the municipal authorities have any power to dispense with such compensation, seems irresistible. I will not attempt to treat a question which is there discussed at length, and with so much ability. The authorities are fully reviewed, and the

subject exhausted; and had I the vanity to suppose myself capable of throwing new light upon it, which I have not, the amount of business that now occupies my attention would prevent. The reason is stated in few words by Chief Justice Shaw in the case of *Inhabitants of Springfield v. Connecticut River R. R. Co.*, 4 Cush. 71: "The two uses are almost, if not wholly, inconsistent with each other; so that taking the highway for a railroad will nearly supersede the former use to which it had been legally appropriated." The dedication to the public as a highway enhances the value of the lot, and renders it more convenient and useful to the owner. The use by the railroad company diminishes its value, and renders it inconvenient, and comparatively useless. It would be a most unjust and oppressive rule which would deny the owner compensation under such circumstances. We think the doctrine of the court of appeals is sound and correct, and without further comment, adopt their opinion as expressing our views upon the subject. The railroad company having taken no steps to acquire the right of way by the assessment and payment of damages to the plaintiffs, it follows that the judgment below must be affirmed.

So far as the judge below placed his decision on the ground that there was no necessity of appropriating the street to the use of the railroad, because there were other adjoining lands which could be as conveniently occupied for that purpose, he was clearly in error. The propriety of taking property for public use is not a judicial question, but one of political sovereignty, to be determined by the legislature, either directly or by delegating the power to public agents, proceeding in such manner and form as may be prescribed: *People v. Smith*, 21 N. Y. 595. Whether the company should appropriate this particular piece of land or that to the use of the road was, therefore, under their charter, a matter which was committed entirely to their discretion; and the logic of the county judge, if good for anything, would be sufficient to defeat the company's location of the line of their road in ninety-nine cases out of every hundred; for in about that proportion of instances the land selected is not so indispensably necessary that some other might not be taken without very great inconvenience.

It seems that the past damages, or those occasioned by the trespass, might have been assessed by the court: *Williams v. New York Cent. R. R. Co.*, 16 N. Y. 97 [69 Am. Dec. 651]; or the judge might perhaps have ordered a jury for that purpose;

but the permanent damages, or those which would accrue to the plaintiff by the continued use of the land by the company, can only be ascertained in the manner prescribed by the statute: *Davis v. La Crosse and M. R. R. Co.*, 12 Wis. 16; *Pettibone v. La Crosse and M. R. R. Co.*, 14 Id. 443.

Judgment affirmed.

PROPRIETORS OF LAND BOUNDED BY PUBLIC STREET own to the center of the street, subject only to the public easement: *Cox v. Freedley*, 75 Am. Dec. 584, note 588, where other cases are collected; *Cox v. Louisville etc. R. R. Co.*, 48 Ind. 188; *Pettibone v. Hamilton*, 40 Wis. 411; *Kneeland v. Van Valkenburgh*, 46 Id. 437; *Burbach v. Schweinler*, 56 Id. 391, all citing the principal case. The fee of a public street is in the abutting owners, and the interest of the public held by a city or village is a mere easement: *City of Racine v. Grotsenberg*, 61 Id. 485, also citing the principal case.

PAYMENT OF COMPENSATION FOR LAND TAKEN FOR PUBLIC USE IS CONDITION PRECEDENT to the taking: See *Bensley v. Mountain Lake Water Co.*, 73 Am. Dec. 575, note 583, where other cases are collected. A railroad company which takes possession of land for which it has not already made compensation under the statute, is a trespasser, and liable to an action: *Sherman v. Milwaukee etc. R. R. Co.*, 40 Wis. 652, citing the principal case. And a constitutional provision that private property cannot be taken for public use without just compensation extends to an adjacent owner's fee in a public highway: Id. 651, citing the principal case.

EXTENT OF LIABILITY OF RAILROAD COMPANY FOR DAMAGES FOR TAKING PROPERTY for its road: See *Johnson v. Atlantic etc. R. R. Co.*, 69 Am. Dec. 560, note 564, where other cases are collected. The owner of lands taken for a railroad is entitled to compensation for all damages actually sustained by reason of their taking, without making any deductions based upon the guess that if the road had not been built across his land it would have been built near it, and consequently he would have been injured to nearly the same extent: *Blescher v. Chicago etc. R'y Co.*, 48 Wis. 191, citing the principal case. Permanent damages which accrue to the plaintiff by the continued use of the land by the company can only be ascertained and recovered in the manner prescribed by the statute: *Carl v. Sheboygan etc. R. R. Co.*, 46 Id. 630, citing the principal case.

APPROPRIATING LAND OF HIGHWAY TO RAILWAY USES imposes a new servitude thereon, such as to entitle the owner of the soil to compensation for the new use: *Imlay v. Union Branch R. R. Co.*, 68 Am. Dec. 392, note 398; *Commonwealth v. Erie etc. R. R. Co.*, 67 Id. 471, note 485, where other cases are collected: *Buchner v. Chicago etc. R'y Co.*, 60 Wis. 272, citing the principal case.

PROPRIETY OF TAKING PROPERTY FOR PUBLIC USE is not a judicial question, but one of political sovereignty, to be determined by the legislature: *Water Works Company of Indianapolis v. Burkhart*, 41 Ind. 371, citing the principal case.

WILSON v. HUNTER.

[14 WISCONSIN, 683.]

ONE PARTNER MAY, BY VIRTUE OF PAROL AUTHORITY FROM HIS COPARTNERS, bind them by an instrument under seal, although as a general rule an authority to bind another by an instrument under seal must itself be created by a like instrument.

WHERE ONE OF THREE PARTNERS EXECUTES, IN FIRM NAME, WITH CONSENT OF HIS COPARTNERS, mortgage on land owned by one of the other partners, for the purpose of securing a partnership debt, such mortgage will be valid as against a party who, with actual notice thereof, takes a subsequent mortgage of the same property from the partner in whose name the title stands.

LAND WHICH IS ESSENTIAL TO USE OF BUILDING PASSES BY CONVEYANCE OF BUILDING, if it appears that such was the intention of the parties.

ACTION to foreclose a mortgage. The acknowledgment by Ethan H. Smith stated that he "acknowledged the execution thereof to be his free act and deed, for the uses and purposes therein mentioned, on behalf of said firm." The other facts are stated in the opinion.

E. Mariner, for the appellant.

Finches, Lynde, and Miller, for the respondent.

By Court, PAINE, J. In this case, George H. Smith and others were partners, owning a store on land, the legal title to which was in George H. Smith alone. They agreed to execute a mortgage on it to the appellant, and Ethan H. Smith, one of the partners, with the assent of George H. and the others, executed the mortgage in the name of George H. Smith & Co. He also acknowledged it. The defendant Hunter subsequently took a mortgage on the same property from George H. Smith and wife. This suit was brought to foreclose the first mortgage, and Hunter claims that it was invalid, for the reason that the title was in George H. Smith, and that Ethan A. had no authority to execute the mortgage in the name of George H.

We think the court below was wrong in finding that Hunter had no notice in fact of the existence of the mortgage to the appellant. George H. Smith testified that he thought Mr. Hunter must have known of the existence of the mortgage to Mr. Wilson; he thought he "wrote to him that there was such a mortgage." And he testified positively that he sent him an abstract of the title to the land, which contained a full and specific description of the appellant's mortgage. Now, whether that mortgage was so executed as to entitle it to be recorded,

or not, this must be regarded as very full and complete actual notice. It is highly probable that George H. Smith did mention expressly the existence of this mortgage, as he says he thinks he did. But whether he did or not, the sending of the abstract showing its existence was equivalent to a direct statement from him that there was such a mortgage, and that it had been recorded. And it seems very evident from the respondent's answer that he knew of its existence, and that he now relies, not upon a want of such knowledge, but upon the alleged defective execution.

The question therefore is, whether the mortgage was valid to bind the interest of George H. Smith in the premises conveyed. The general rule undoubtedly is, that an authority to bind another by an instrument under seal must itself be created by a like instrument. And it was upon this rule, and for the want of any such authority here, that the court below held this mortgage invalid. But an exception to this rule seems to have been established in the case of partners, and it has been held that they may give each other authority by parol to bind each other by instruments under seal: *Cady v. Shepherd*, 11 Pick. 400 [22 Am. Dec. 379]; *Swan v. Stedman*, 4 Met. 548; *Smith v. Kerr*, 3 N. Y. 144; *Gram v. Seton*, 1 Hall, 262.

Some of these cases, it is true, relate merely to personal contracts, and not to conveyances of real estate. But if the principle be once established that a partner may give his copartner authority by parol to bind him by instruments under seal, it must extend as well to instruments affecting real estate as to others. And in *Harrison v. Jackson*, 7 T. R. 207, where the question was whether the relation of partnership gave such authority, Lord Kenyon said that if the authority existed, it "would extend to the case of mortgages."

The court is inclined to adopt the doctrine of the cases above cited, though for my own part I am obliged to confess that I have assented to it with considerable reluctance. When it is once conceded, as it is universally, that an authority to bind each other under seal does not arise from the partnership relation merely, I can see no very good reason why such authority should be created in the case of partners in any different manner or with any less formalities than are requisite in other cases. On the contrary, there seems much ground for believing that certainty would be best promoted by holding to a uniform rule in all cases.

But upon the doctrine of the cases referred to, this mortgage

having been given in the partnership business for a partnership debt, and by the previous consent of all the parties, and the name of George H. Smith, the owner of the legal title, having been actually signed, it must be held a valid mortgage as against him, and consequently it is good against Hunter, who took a subsequent mortgage with notice of its existence.

The mortgage described the premises conveyed as "the three-story brick building now occupied by them as a store," and "situated on land described as follows: Lot No. 1, in block No. 9, in the village of Whitewater." In point of fact, the store not only covered lot No. 1, but also the west two feet of lot No. 10 in that block. But there can be no doubt that the intent of the parties was to convey the store and all the land it stood upon. The land which is essential to the use of a building will pass by a conveyance of the building, if it appears that such was the intention of the parties: *Gibson v. Brockway*, 8 N. H. 465 [31 Am. Dec. 200]; *Maddox v. Goddard*, 15 Me. 224 [33 Am. Dec. 604]; *Moore v. Fletcher*, 16 Id. 66 [33 Am. Dec. 633]; *Whitney v. Olney*, 3 Mason, 280.

The judgment is reversed, with costs, and the cause remanded, with directions to enter judgment for the plaintiff of foreclosure and sale to make the amount due on the mortgage.

DEED EXECUTED BY PARTNER IN NAME OF FIRM: See *Shirley v. Fearn*, 69 Am. Dec. 375, note 381. A bond signed by one partner in the firm name will bind all the partners consenting to such signature: *Kasson v. Estate of Brocker*, 47 Wis. 85, citing the principal case.

COLEMAN v. WHITE.

[14 WISCONSIN, 700.]

ALL STOCKHOLDERS OF BANK ARE LIABLE TO ALL ITS CREDITORS, under section 18 of chapter 71 of the revised statutes, as original and principal debtors substantially as if they were copartners, save that the responsibility of each is limited to a sum equal to his shares of stock, and this liability attaches the moment a debt is contracted by the bank.

REMEDY OF CREDITOR OF BANK UNDER GENERAL BANKING LAW OF WISCONSIN is by suit in equity, in which all the creditors should join, or one or more of them should sue for the benefit of all, and the suit should be against the bank and all the stockholders, unless it be impracticable to bring them all before the court, or some other sufficient cause for omitting any of them be shown.

APPEAL from the circuit court for Racine county. The opinion states the case.

Strong and Fuller, for the appellant.

Sanders and Ladd, for the respondent.

By Court, DIXON, C. J. Section 18 of the general banking law, chapter 71 of the revised statutes, declares: "The stockholders in every corporation or association organized under the provisions of this chapter shall be individually responsible to the amount of their respective share or shares of stock, for all its indebtedness and liabilities of every kind." This is an action at law founded upon this section, instituted by the plaintiff as a creditor of the City Bank of Racine, a corporation organized under the act, against the defendant, an individual stockholder, to recover a debt due from the bank; and the questions presented relate to the nature of the liability imposed, and the form of remedy to be pursued. Other questions are presented by the case, but the disposition we make of these renders their consideration unnecessary.

We are of opinion that the liability is primary and absolute, and attaches the moment the debt is contracted by the bank; that it is a liability of all the stockholders to all the creditors, on the principal of copartnership, the stockholders standing on substantially the same footing as though they were partners or an incorporated association, save only that the responsibility of each is limited to a sum equal to his share or shares of stock. Subject to this limitation, they are answerable as original and principal debtors, and their liability more nearly resembles that of copartners than any other with which it can be compared. These positions, it is believed, are fully sustained by the following authorities: *Marcy v. Clark*, 17 Mass. 330; *Allen v. Sewall*, 2 Wend. 327; *Sewall v. Allen*, 6 Id. 335; *Moss v. Oakley*, 2 Hill (N. Y.), 265; *Harger v. McCullough*, 2 Denio, 119; *Corning v. McCullough*, 1 N. Y. 47 [49 Am. Dec. 287]; *Matter of Empire Bank*, 18 Id. 218; *Mokelumne Hill C. Co. v. Woodbury*, 14 Cal. 265; *Wright v. Field*, 7 Ind. 376; *Planters' Bank v. Bivingsville Man. Co.*, 10 Rich. L. 95; and cases hereafter cited.

We are persuaded that the remedy should be by suit in equity, in which all the creditors should join, or one or more of them should sue for the benefit of all, and that the action should be against the bank and all the stockholders, unless it be impossible or impracticable to bring them all before the court, or some other sufficient cause for the omission be shown. This conclusion, we think, follows necessarily from the nature

of the obligation imposed, it being a liability on the part of all the stockholders, in proportion to the amounts of their respective shares, to all the creditors according to the sums severally due them. It is an indebtedness which a court of law has no power to regulate and adjust, and to which the jurisdiction and powers of equity are peculiarly and exclusively adapted. The creditors should all join, because they have a common interest in the funds to be realized; or if the action be commenced by one or more of them, the complaint should be so framed that the others may come in and prove their claims before the court or a referee, and share in the distribution of the moneys received. All the stockholders should be made defendants, because they too have a common interest, and without their presence it is impossible to adjust their rights and liabilities, and protect them from unequal and oppressive burdens. The same reasons exist for making all the stockholders parties to such actions as in proceedings against delinquent stock subscribers to compel them to contribute towards the payment of the debts of an insolvent or bankrupt corporation: See *Adler v. Milwaukee Pat. Brick Co.*, 13 Wis. 57. The corporation should be joined, unless it has been dissolved, or its assets wholly exhausted, for the reason that both creditors and stockholders are interested in closing its affairs and in having its available property appropriated to the payment of debts, without which there can be no final settlement and adjudication of the rights and liabilities of the parties.

In coming to these conclusions in opposition to the decisions of the courts of New York, in *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473, and subsequent cases, we have yielded to what we deem the better considered and more rational and satisfactory decisions of the supreme court of Massachusetts upon similar statutes. In *Harris v. First Parish in Dorchester*, 23 Pick. 112, it was held that an action at common law would not lie in favor of a creditor of a bank against a stockholder, to enforce a provision of statute that if any loss or deficiency should arise from the official mismanagement of the directors, the stockholders should, in their individual capacity, be liable to pay the same; but the remedy was by bill in equity. In the late case of *Crease v. Babcock*, 10 Met. 525, it was determined, under a statute creating a similar liability, that the bill-holders could not severally maintain a bill in equity against the stockholders to compel payment and redemption of the unpaid bills held by them respectively, but that all of

them must join in one bill, or one or more of them must file a bill for the benefit of all against all the stockholders. The reasoning of the court in the first case covers the whole ground, and is, to our minds, quite conclusive. After advert- ing to the well-known principle upon which the courts of New York place the right of each creditor to maintain a separate action, that when a statute creates a right but does not estab- lish any particular remedy, the common law, to effectuate the purposes of the statute, interposes and supplies a convenient and adequate remedy, the court says: "If actions at law will lie, suits may be multiplied to an indefinite extent. Each bill-holder or other creditor must have his separate suit, and each stockholder must be sued separately. Again: suits be- tween stockholders to adjust their contributions would be in- terminable. If a creditor's demand be larger than the amount of stock owned by any one, he must have several suits against several individuals on the same cause of action, or lose a part of his just demand. If any one stockholder owned more stock than was needed to meet any one claim made upon him, he would be liable to several suits. It may happen, and proba- bly has happened in this instance, that a bank owes more than the amount of its whole capital. In such case, there must either be a *pro rata* division among the creditors of what may be recovered, which would be impracticable in suits at law, or those who sue first must recover the whole of their debts, leaving others totally remediless, which would be pal- pably unjust. The evils and inconveniences of attempting to enforce this section by suits at common law would be incal- culable; and such remedy would be inadequate, vexatious, and mischievous. The only proper means of giving effect to this provision is by a process in equity; and this, of all cases which can arise, seems to call most loudly for a chancery jurisdiction. To a bill in equity, all persons, however numer- ous, might be made parties; and all the relative and conflict- ing claims of the many creditors and stockholders settled, and their proportionate rights to recover, and liabilities to contribute, adjusted in a single suit. We are all, therefore, of opinion that this case comes within the equity jurisdiction of the court, and that an action at law will not lie."

It is worthy of observation that these decisions are placed entirely upon the provisions of statute creating the liability, and were made without reference to any other statute indicat- ing that the proceeding in equity was that intended by the

legislature; it being considered, from the nature of the obligation imposed, that the equitable remedy alone was applicable, and that the legislature impliedly adopted it. We are not required to go so far, since we have a statute which plainly points to the equitable process as that which the legislature designed should be used. Sections 21 to 32 inclusive, of chapter 148 of the revised statutes, clearly refer to proceedings of this nature, and point out the several steps to be taken, which must be in a court of equity. These provisions were in force at the time the banking law was enacted, as sections 9 to 20 of chapter 114 of the revised statutes of 1849, and it must be presumed that in creating the liability the legislature intended to adopt the remedy prescribed by them.

Although we do not intend to criticise the opinions of the courts of New York, we may with propriety suggest that the inconvenience and delays suffered by the smaller creditors in consequence of being deprived of their action at law, and compelled to resort to equity, are perhaps compensated by the certainty which they have of receiving their due proportion of the funds realized. The door to favoritism and preferences, as between stockholders and different creditors, is closed, and the doctrine of equality among all the creditors firmly established. This we believe to be in accordance with the intention of the legislature. If the delays of a court of chancery are considered as a hardship, the loss by the creditor of his entire demand may possibly be regarded as a greater; and though the protection of the stockholders alone might not be a sufficient ground for proceedings in equity, yet the combined benefits resulting both to them and the creditors may be.

We are of opinion that this action cannot be maintained, and that the judgment of the circuit court must be reversed, and the cause remanded, with directions that it be dismissed.

LIABILITY OF STOCKHOLDERS OF BANK IS PRIMARY and absolute, and attaches the moment the debt is contracted; and their liability more nearly resembles that of copartners than any other with which it can be compared: *Merchants' Bank v. Chandler*, 19 Wis. 438; *Fuller v. Ledden*, 87 Ill. 312, both citing the principal case; *Ohio L. & T. Co. v. Merchants' etc. Co.*, 53 Am. Dec. 742, note 770, where other cases are collected.

REMEDY OF CREDITOR OF BANK AGAINST ITS STOCKHOLDERS is by bill in equity: *Jones v. Jarman*, 34 Ark. 340; *Cleveland v. Burnham*, 55 Wis. 605, both citing the principal case.

THE PRINCIPAL CASE IS DISTINGUISHED in *Cleveland v. Marine Bank of Milwaukee*, 17 Wis. 549.

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ACCIDENT.

See EQUITY; PLEADING AND PRACTICE, 1.

ACCORD AND SATISFACTION.

1. PLEA OF ACCORD AND SATISFACTION MUST ALLEGE, NOT ONLY CLEAR ACCORD, but that it was executed, and that the matter agreed upon was accepted in satisfaction; mere readiness to perform the accord, or a tender of performance, or even a part performance and readiness to perform the rest, will not be sufficient. *Hearn v. Kiehl*, 472.
2. MERE TENDER TO CREDITOR'S COUNSEL OF SMALLER SUM than is due, a little sooner than the whole debt is due, without acceptance by either the creditor or his counsel, is no satisfaction. *Id.*

ACKNOWLEDGMENTS.

1. CERTIFICATE OF ACKNOWLEDGMENT TO DEED, regular upon its face, is not conclusive evidence of the matters contained therein. *Dodge v. Hollinshead*, 433.
2. IT IS NECESSARY TO CONSTITUTE VALID CONVEYANCE of real estate by a married woman, and of the essence of the execution of the instrument, that her acknowledgment be taken separate and apart from her husband, and that she acknowledge that she executed such instrument freely and without any fear or compulsion from any one. *Id.*
3. MORTGAGE WILL NOT BE SUSTAINED which defrauds a wife of her property, although her signature was obtained without any fraudulent representations on the part of any one, if it appears that the contents of the mortgage were unknown to her at the time of signing, that she supposed it to be other property than it actually was, that she never received any consideration for signing the mortgage, that her acknowledgment was taken in no manner whatever, and that she did not intend to incumber or convey her homestead. *Id.*
4. IF ALDERMAN FALSELY OR BY MISTAKE CERTIFIES TO SEPARATE EXAMINATION and acknowledgment of a married woman, in a mortgage of her separate estate, although she never signed the instrument nor appeared before him, the mortgagee will be affected by the fraud, although he was not present at the acknowledgment nor informed of what took place. He cannot, in such a case, be presumed to be a *bona fide* purchaser; nor is it necessary to prove that he had notice of the fraud or mistake. *Nichener v. Cavender*, 486.

"ACT OF GOD."

See COMMON CARRIERS, 4.

ACTIONS.

See ASSUMPSIT; PLEADING AND PRACTICE; REPLEVIN; TROVER.

ADULTERY.

See CRIMINAL LAW, 12.

ADVANCEMENTS.

1. QUESTIONS OF ADVANCEMENT ARE ALWAYS QUESTIONS OF INTENTION OF PARENT, and of intention at the time the property is received by the child. *Miller's Appeal*, 555.
2. MONEY EXPENDED BY PARENT FOR CHILD'S EDUCATION NOT TO BE PRESUMED ADVANCEMENT, without proof that such was parent's intention; nor is there such presumption where security is taken from the child for the amount received, or where the parent attempts to preserve evidence of it as a debt, by note, bond, book-account, or otherwise. *Id.*
3. DECLARATIONS BY PARENT THAT HE INTENDED EXISTING DEBT AS ADVANCEMENT, not made to child, nor assented to by him, are not sufficient to convert such debt into an advancement. *Id.*

ADVERSE POSSESSION.

1. WHERE DEFENDANT SHOWS POSSESSION IN HIMSELF OF LAND IN CONTROVERSY for three years prior to the commencement of the suit, holding by a regular chain of title from or under the sovereignty of the soil, it is a good defense, although the jury may believe that fraud in obtaining the deed was sufficiently proved. *Pearson v. Burditt*, 649.
2. LEADING OBJECT OF STATUTE OF LIMITATIONS OF THREE YEARS is to make that period of adverse possession of land mature the inferior title in the hands of the possessor into the superior title. *Id.*
3. TERMS "INTRINSIC FAIRNESS AND HONESTY," EMBRACED IN DEFINITION OF COLOR OF TITLE IN TEXAS STATUTE, relate to the means of proving the right of property in the land so as to make the title equitably equal to a regular chain. *Id.*
4. WHERE IN ACTION UNDER STATUTE authorizing any person in possession of real property, by himself or tenant, to commence action against any one claiming adverse interest or estate therein for the purpose of determining such interest, and possession is directly put in issue, it is not error for the court to refuse to dismiss the action, if the plaintiff has introduced enough evidence touching his possession to justify the court in leaving this question to the jury. *Meighen v. Strong*, 441.
5. PRESCRIPTION IN ENGLAND MUST HAVE EXISTED beyond time of legal memory. *Webber v. Chapman*, 111.
6. PRESCRIPTIVE RIGHT IN THIS COUNTRY IS CREATED by an uninterrupted user of an incorporeal hereditament, under a claim of right for twenty years, as between parties under no disability, with the knowledge of and without interruption from those adversely interested. Such a title is conclusive evidence of a grant or a right, as the case may be; and such user and enjoyment may be used as proof of a deed or record which has been lost by time or accident, or of a prescriptive right which always presupposes a grant. *Id.*
7. IN CASE OF PRIVATE WAYS, NON-USER FOR TWENTY YEARS AFFORDS CONCLUSIVE PRESUMPTION that right to them never existed, or has been extinguished in favor of some adverse right. *Id.*

8. **GRANT WILL BE PRESUMED FROM LAPSE OF TIME AGAINST STATE OR SOVEREIGN** as well as against individuals. Thus the grant of a public highway may be presumed. And there is no room for making a distinction between a highway by dedication and one laid out in any other way, by the laws in force upon that subject, or acquired by any process or means whatever. *Id.*

See HIGHWAYS, 6.

AGENCY.

1. **TRANSACTION BETWEEN PARTIES CREATES RELATION** of principal and broker, or agent, where bankers receive money to be loaned out, and agree with the depositor to account to him for the principal and interest, less their charges. In such case, the bankers are only limited in their conduct to the observance of good faith, and the exercise of proper care and circumspection. If they in good faith loan the money to a party solvent at the time, they are protected, notwithstanding the party to whom the money is loaned subsequently becomes insolvent. *Wykoff v. Irvine, Stone, & McCormack*, 461.
2. **RELATION OF PARTIES TO EACH OTHER** as fixed by written agreement cannot be changed by parol evidence. *Id.*
3. **RULE OF RESPONDEAT SUPERIOR IS APPLICABLE** when the relation of principal and agent or master and servant exists; but not when the relation is that of contractor only. *City of Detroit v. Corey*, 78.
4. **RELATION OF CONTRACTOR EXCLUDES THAT OF PRINCIPAL AND AGENT** of master and servant, in all ordinary transactions; but there is not necessarily such a repugnance between them that they cannot exist together. *Id.*
5. **RELATION OF CONTRACTOR AND OF PRINCIPAL AND AGENT MUST NECESSARILY EXIST TOGETHER**, where one contracts with a municipal corporation to construct a sewer through one of its streets. *Id.*
6. **MUNICIPAL CORPORATION IS LIABLE FOR INJURIES CAUSED BY NEGLIGENCE OF CONTRACTOR** in not placing guards to an excavation in its streets for a sewer, although the corporation was required by its charter to let the contract to the lowest bidder, and the contract provided that the contractor should at all times keep the excavation fenced in or carefully guarded, and should be liable for all damages that might arise from accidents caused by his neglect. *Id.*
7. **AGENT IS LIABLE IN TROVER FOR CONVERTING MONEY OF HIS PRINCIPAL** to his own use, in the absence of any authority on the part of the agent to treat the money collected by him as his own, and to consider himself the absolute debtor of the principal for the amount. *Cotton v. Sharpstein*, 774.
8. **AGENT IS COMPETENT WITNESS FOR PRINCIPAL** except where the latter is sued on account of the agent's negligence. *Struthers v. Kendall*, 610.

See CORPORATIONS, 8; PARTNERSHIP.

ALIMONY.

See MARRIAGE AND DIVORCE, 4.

ALTERATION OF INSTRUMENTS.

See ATTACHMENTS, 1; NEGOTIABLE INSTRUMENTS, 14.

AMENDMENTS.

See PLEADING AND PRACTICE, 2, 3, 16; PROCESS.

ANIMALS.

DOMESTIC ANIMAL'S BEING IN HIGHWAY CANNOT OF ITSELF BE REGARDED AS UNLAWFUL, rendering the owner liable for injurious consequences that may accidentally flow therefrom. In order that it should be wrongful, it should appear that the circumstances and occasion, or the character and habits of the animal, were such as to show carelessness on the part of such owner in reference to the convenience and safety of travelers on the highway. *Holden v. Shattuck*, 684.

See FENCES.

APPEAL.

See PLEADING AND PRACTICE, 13-16.

ARREST.

CITIZEN IS BOUND TO ASSIST KNOWN PUBLIC OFFICER IN MAKING ARREST, when called upon to do so, and need not inquire into the regularity or legality of the process in the officer's hands. *McMahan v. Green*, 665.

See ATTORNEY AND CLIENT, 1.

ARBITRATION AND AWARD.

1. **AWARD AGAINST ONE RAILROAD COMPANY IS NO BAR TO ACTION AGAINST ANOTHER COMPANY**, for an injury caused to a passenger through the negligence of both, where the award is returned into court, in compliance with the terms of the submission, and it is still pending there without judgment having been entered thereon, although the costs of the arbitration were paid by the company against whom the award was made. *Todd v. Old Colony etc. R. R. Co.*, 49.
2. **AWARD ESTABLISHING BOUNDARY LINE BETWEEN ESTATES OF ADJACENT PROPRIETORS**, under a submission for that purpose, is conclusive upon the parties. *Thayer v. Bacon*, 59.
3. **AGREEMENT DOES NOT CONSTITUTE SUBMISSION TO ARBITRATION**, so as to make lines run thereunder conclusive upon the parties, where it is executed by proprietors of adjoining lands, reciting that they were desirous of having their respective lines run so that each might know his boundary, and agreeing to employ a surveyor to run the lines, and put up stakes, or marks, to designate each lot, and to pay the expense proportionally. *Id.*

See REFEREES.

ASSIGNMENTS.

See EXEMPTIONS, 5.

ASSUMPSIT.

1. **ASSUMPSIT FOR MONEY HAD AND RECEIVED** will lie whenever one has the money of another which he has no right to retain, but which, *ex æquo et bono*, he should pay over to that other. In such case, plaintiff is not bound to declare specially. *Lawson v. Lawson*, 702.

2. **ACTION OF INDEBITATUS ASSUMPSIT** has been greatly enlarged, and now embraces all cases in which plaintiff has equity and conscience on his side, and defendant is bound by ties of natural justice and equity to refund the money. In such cases, no express promise need be proved. *Id.*

See **EXECUTORS AND ADMINISTRATORS**, 3; **USE AND OCCUPATION**, 1; **WILLS**, 25.

ATTACHMENTS.

1. **WRIT OF ATTACHMENT CANNOT BE RIGHTFULLY ALTERED**, after a service thereof has been made, by the insertion therein of a direction to summon a certain person as trustee; and there can be no rightful service of the writ after such alteration. *Brown v. Neale*, 53.
2. **ATTACHMENT OF PROPERTY ON MESNE PROCESS IS NOT DISSOLVED BY DEATH** of the debtor after judgment and before the sale of such property. And if the estate were decreed to be administered as insolvent, after the death of the debtor, and before such sale, or demand made of the receiptor within thirty days after judgment, where the property has been receipted for, it is questionable whether it would alter the case. *Waitt v. Thompson*, 136.
3. **WHERE DEFENDANT IN ATTACHMENT DIES AFTER JUDGMENT, ONE WHO HAS RECEIPTED** for the attached property will be liable for it if a demand is made upon him for it within thirty days after judgment, even though the debtor dies before such demand. *Id.*
4. **IF ONE WHO HAS RECEIPTED FOR ATTACHED PROPERTY ALLOWS IT TO GO BACK INTO, or to remain in, the hands of the debtor, and the latter sells it, the receiptor is liable.** Having intrusted the property to the debtor, he will be responsible to the sheriff for the debtor's acts. *Id.*
5. **MONEYS COLLECTED BY SHERIFF UPON EXECUTION CANNOT BE GARNISHED IN HIS HANDS** or seized on an attachment in favor of a creditor of the execution plaintiff, and particularly where such creditor is the sheriff himself. *Hill v. La Crosse etc. R. R. Co.*, 783.

See **EXEMPTIONS**.

ATTORNEY AND CLIENT.

1. **ATTORNEY AT LAW EMPLOYED TO COLLECT CLAIM, WHO AFTER COLLECTING IT CONVERTS PROCEEDS** thereof to his own use, is liable to be arrested and held to bail in a civil action. *Cotton v. Sharpstein*, 774.
2. **ATTORNEY AT LAW IS MERELY AGENT OF HIS CLIENT**, and the title to the property which he collects is in the client, and not in him. He is, therefore, liable to an action of trover for the conversion of that property, with all the legal consequences of such an action, among which is an execution against the body. *Id.*
3. **ATTORNEY HAS LIEN FOR HIS FEES UPON MONEY OR PAPERS OF HIS CLIENT** while they are in his hands; but possession is as indispensable to his lien as it is to the lien of an ordinary bailee or factor. *Dubois's Appeal*, 478.
4. **ATTORNEY CANNOT MAINTAIN CLAIM UPON FUND IN COURT AGAINST MORTGAGEE** or a judgment creditor, even though such mortgagee or creditor be his own client. An attorney has no title to the judgment which he secures, or to the mortgage which he is instrumental in obtaining, and not being an owner, he cannot claim as a distributee. *Id.*

5. WISCONSIN COURTS OF RECORD, HAVING CRIMINAL JURISDICTION, HAVE POWER, AND IT IS THEIR DUTY, TO APPOINT COUNSEL to defend persons charged with crime, and whose poverty renders them unable to employ counsel. *County of Dane v. Smith*, 754.
6. COUNTY MUST PAY FOR SERVICES OF COUNSEL APPOINTED BY COURT TO DEFEND PAUPERS and other indigent persons charged with crime; because there is an implied promise to pay, and an employment previously authorized. *Id.*
7. COUNTY MUST PAY FOR SERVICES OF COUNSEL APPOINTED BY COURT TO DEFEND INDIGENT PERSONS charged with crime, notwithstanding a statute which declares that a county shall not be held liable to pay for such services. Such a statute is void: See Laws of Wisconsin, 1860, c. 35. *Id.*
8. LEGISLATURE HAS NO POWER TO CONFER AUTHORITY ON COURTS TO APPOINT COUNSEL TO DEFEND INDIGENT PERSONS charged with crime, and at the same time require that the services of counsel shall be rendered in such cases without compensation. *Id.*

See EXECUTIONS, 7, 8; HUSBAND AND WIFE, 3-5.

BAILEMENTS.

1. WAREHOUSEMAN HAVING IN HIS POSSESSION GOODS SUBJECT TO OWNER'S DIRECTIONS as to their shipment is at liberty, in the absence of instructions, to use his discretion in shipping by the usual or best route; but if he has specific instructions, he is bound to follow them. *Graves v. Smith*, 762.
2. WHERE SHIPPER OF GOODS NOTIFIES WAREHOUSEMAN that he has contracted with a certain railroad company to carry them to their destination, and the warehouseman replies that "it is all right," he has no right to afterwards send the goods in any other way; and if he does so, and they are lost, he will be liable therefor. *Id.*
3. EMPLOYMENT OF WAREHOUSEMAN AND FORWARDING MERCHANT, IN USUAL COURSE OF HIS BUSINESS, imports a hiring, and that he is to be paid. *Id.*
4. FORWARDER EMPLOYED WITH DIRECTIONS TO SEND GOODS BY RAILWAY to their destination, who ships them by water, is guilty of a conversion thereof. *Id.*
5. BAILEE LIABLE ONLY FOR GROSS NEGLIGENCE IS STILL LIABLE FOR ACTUAL CONVERSION of the property. *Id.*
6. PRINCIPAL'S ACT IN DEPOSITING FUNDS WITH BAILEE FOR PROTECTION OF SURETY IS NOT WITHOUT CONSIDERATION, and the receipt of the funds is in itself a consideration for a promise by the bailee to pay the surety. *Keller v. Rhoads*, 539.

See CRIMINAL LAW, 11; COMMON CARRIERS, 2.

BANKS AND BANKING.

1. ALL STOCKHOLDERS OF BANK ARE LIABLE TO ALL ITS CREDITORS, under section 18 of chapter 71 of the revised statutes, as original and principal debtors substantially as if they were copartners, save that the responsibility of each is limited to a sum equal to his shares of stock, and this liability attaches the moment a debt is contracted by the bank. *Coleman v. White*, 797.
2. REMEDY OF CREDITOR OF BANK UNDER GENERAL BANKING LAW OF WISCONSIN is by suit in equity, in which all the creditors should join, or one

or more of them should sue for the benefit of all, and the suit should be against the bank and all the stockholders, unless it be impracticable to bring them all before the court, or some other sufficient cause for omitting any of them be shown. *Id.*

2. **BANK IS RESPONSIBLE FOR MISTAKING DATE OF NOTE RECEIVED FOR COLLECTION**, when, owing to such mistake, the note was presented for payment before the proper time, and the indorser discharged. *Bank of Delaware Co. v. Broomhall*, 471.
4. **STATUTE OF LIMITATIONS DOES NOT BEGIN TO RUN AGAINST DEPOSIT IN BANK** until demand is made and payment refused. *Girard Bank v. Bank of Penn Township*, 507.
5. **STATUTE OF LIMITATIONS DOES NOT RUN AGAINST CHECK MARKED "GOOD,"** until payment has been actually demanded at the banking-house and refused. The holder of such a check does not stand in a different position from that of an original depositor. *Id.*
6. **BANK ACKNOWLEDGES THAT MONEY REPRESENTED BY CERTIFIED CHECK REMAINS ON DEPOSIT** to the credit of the holder, where it pays a duplicate check to the drawer, taking his bond of indemnity against the check, which the drawer claimed to have lost. *Id.*

See **AGENCY**, 1; **OFFICE AND OFFICERS**, 5, 6.

BEQUESTS.

See **CORPORATIONS**, 1, 2; **WILLS**.

BILLS OF LADING.

See **COMMON CARRIERS**, 5.

BONDS.

1. **TOWN BONDS ISSUED PURSUANT TO LAW NOT YET IN FORCE** for want of publication are without authority of law and void. *Town of Rochester v. Alfred Bank*, 746.
2. **TOWN SUPERVISORS CANNOT, OF THEMSELVES, GIVE VALIDITY TO VOID BONDS**, where the assent of the people of the town is required to enable them to issue such bonds. *Id.*
3. **THERE CAN BE NO INNOCENT PURCHASER OF VOID BONDS**, where the defect is a matter of law, with a knowledge of which every person is chargeable. *Id.*
4. **"IGNORANCE OF LAW EXCUSES NO ONE,"** is MAXIM applicable to purchasers of bonds void for some defect which is matter of law unmixed with matter of fact. *Id.*

See **BANKS AND BANKING**, 6; **CONTRACTS**, 11; **OFFICE AND OFFICERS**, 4-6; **REPLEVIN**, 2; **SURETYSHIP**, 3, 4.

BOUNDARIES.

ESTOPPEL IS NOT CREATED AS AGAINST OWNER OF LAND, from claiming that lines run by a surveyor at the expense of himself and an adjoining proprietor are not the true lines, where such adjoining proprietor adopts the lines and builds in conformity with them, unless the former had knowledge, or reason to believe, that the latter was making expenditures upon the faith of a supposed agreement to treat the lines thus run as the true lines. *Thayer v. Bacon*, 59.

See **ARBITRATION AND AWARD**, 2, 3.

BREACH OF PROMISE
See MARRIAGE AND DIVORCE, 1-3.

BROKERS.
See AGENCY, 1.

BURDEN OF PROOF.
See CRIMINAL LAW, 5, 6; NEGLIGENCE, 4-7.

BURGLARY.
See CRIMINAL LAW, 8-10.

CANON LAW.
CANON LAW OF ROMAN CATHOLIC CHURCH IS WITHOUT FORCE OR AUTHORITY, AS SUCH, IN VERMONT, and is to be considered in determining the legal rights of parties only so far as it is recognised in or made part of some agreement under which those rights are derived. *O'Hear v. De Goesbriand*, 653.

- CERTIORARI.**
1. **WRIT OF CERTIORARI IS NOT ONE OF RIGHT at the common law, but rests in the sound discretion of the court, to be allowed or not, as may best promote the ends of justice; and statutory provisions requiring the writ to be issued within a certain time, and providing for its allowance out of court, do not take away the court's discretionary power. *In the Matter of Landis*, 85.**
 2. **WRIT OF CERTIORARI QUASHED FOR LACHES OF PARTIES in not suing it out sooner. *Id.***

CHARACTER.
See CRIMINAL LAW, 14, 16; EVIDENCE, 8.

- CHARITIES.**
1. **GIFT TO CHARITY VOID AT LAW FOR WANT OF ASCERTAINED BENEFICIARY will nevertheless be upheld, if the thing given be certain, if there is a competent trustee to take and administer the fund as directed, and if the charity itself be precise and definite. *Beekman v. Bonsor*, 269.**
 2. **CHARITABLE TRUSTS MUST BE CAPABLE OF EXECUTION BY JUDICIAL DECREE in affirmance of the gift as the donor made it; the *cy pres* power, as exercised in England in cases of charities, not existing in New York. *Id.***
 3. **CHARITABLE GIFT OF SUM WHICH IS LEFT UNCERTAIN, or in the discretion of executors who have renounced the trust, is void, and next of kin are entitled to the fund, such defect being incurable, even by the *cy pres* power. *Id.***
 4. **GIFT OF MONEY IN TRUST TO EXECUTORS, to be applied in their discretion to the use of societies for the support of indigent and respectable females, without further designation of the beneficiaries, where such executors have renounced the trust, cannot be upheld. *Id.***

See UNINCORPORATED SOCIETIES.

CHASTITY.
See CRIMINAL LAW, 14-16.

CHATTEL MORTGAGES.

See MORTGAGES.

CHECKS.

See BANKS AND BANKING, 5, 6.

CHURCHES.

See CANON LAW; SUBSCRIPTIONS, 4, 5.

COLLATERAL SECURITIES.

WHERE STOCK IS HELD AS COLLATERAL SECURITY FOR PAYMENT OF PROMISSORY NOTE which is indorsed by a third person, and the holder, without the consent of the original owner of the stock, releases the indorser for the purpose of making him a witness in a suit in equity by such owner for the recovery of the stock, the stock will be thereby released, and cannot be held for the purpose of enforcing payment of the note. *Denny v. Lyon*, 463.

See POWERS.

COLOR OF TITLE.

See ADVERSE POSSESSION.

COLLISION.

See COMMON CARRIERS, 5.

COMMON CARRIERS.

1. **DUTY OF COMMON CARRIERS BY RAILWAY** is to transport goods to the place of destination and deposit them, without delay or additional charge, in their warehouse until the owner or assignee has a reasonable time to remove them. They need not deliver the goods at the place of business of the owner or assignee, nor give notice of their arrival. *Morris & Essex R. R. Co. v. Ayers*, 215.
2. **COMMON CARRIER BY RAILWAY BECOMES WAREHOUSEMAN**, and responsible only as such when he has transported the goods to their place of destination and safely stored them and has them ready for delivery. *Id.*
3. **OWNER OF GOODS TRANSPORTED BY RAILROAD** must remove them within a reasonable time after they have reached their place of destination. *Id.*
4. **PHRASES "ACT OF GOD," "INEVITABLE ACCIDENT," "UNAVOIDABLE DANGERS** of river navigation," etc., discussed and distinguished. *Hays v. Kennedy*, 627.
5. **CARRIER OF GOODS**, who in his bill of lading exempts himself from liability, if loss happens by reason of unavoidable dangers of navigation, is not liable for loss entailed by reason of a collision in which he is free from blame. This exception exempts the carrier from all loss by dangers which he cannot avoid, although he uses due diligence in trying to avert it. *Id.*
6. **PASSENGER ATTEMPTED TO BE EJECTED FROM RAILROAD CAR WHILE IN MOTION** will, from the dangerous nature of such act, be justified in making the same resistance as he would to a direct attack on his life. *Sanford v. Eighth Avenue R. R. Co.*, 286.
7. **THROUGH-PASSENGER IS LIABLE TO EJECTION IN PROPER MANNER FOR REFUSING TO PAY FARE**, his resistance to an attempt to expel him with-

out stopping the car does not present a case of contributory negligence on his part. *Id.*

8. AS RAILROAD COMPANY DIRECTING CONDUCTOR TO EJECT PASSENGERS for failure to pay fare is responsible for his act in so doing, it becomes also responsible for any circumstance of aggravation which attends the wrong. *Id.*
9. RAILROAD COMPANY IS LIABLE TO PASSENGER, CARRIED FREE OF CHARGE, for injuries caused by its omission to use due and reasonable care. *Todd v. Old Colony etc. R. R. Co.*, 49.
10. PASSENGER IN RAILROAD CAR, WHO RIDES WITH HIS ELBOW OR ARM OUT OF WINDOW, by reason of which he sustains an injury, is guilty of a want of due care, which will prevent him from maintaining an action for damages. *Id.*

See ARBITRATION AND AWARD, 1; BAILMENTS, 2.

COMMON LAW.

See CERTIORARI, 1; HUSBAND AND WIFE, 9; JOINT DEBTORS, 2.

CONDITIONS.

1. CONDITIONS SUBSEQUENT ARE NOT FAVORED IN LAW, and are to be strictly construed, especially when relied upon to work a forfeiture. *Emerson v. Simpson*, 184.
2. WHERE CONDITION APPLIES IN TERMS TO GRANTEE OR LESSEE, without mention of heirs, executors, or assigns, the condition cannot be broken after the death of the grantee or lessee. If heirs and executors are named, but assignees are not, it will not be broken by any act of an assignee. *Id.*
3. WHERE DEED IS MADE UPON CONDITION THAT GRANTEE SHALL FOREVER KEEP UP and maintain a fence on the line between the land conveyed and the grantor's land, the land will not be forfeited because of the fact that the fence is not kept up after the death of the grantee. *Id.*

CONFLICT OF LAWS.

1. NEW HAMPSHIRE LAWS IMPOSE UPON MASSACHUSETTS MUTUAL INSURANCE COMPANIES acting within the state of New Hampshire the same obligations and disabilities that the laws of Massachusetts impose upon New Hampshire insurance companies acting within the state of Massachusetts. *Haverhill Ins. Co. v. Prescott*, 123.
2. WHERE CONTRACT OF INSURANCE WAS MADE WITH RESIDENT OF NEW HAMPSHIRE, and upon property situated there, by a Massachusetts mutual insurance company, which had not complied, in New Hampshire, with the obligations and requirements imposed by the laws of Massachusetts upon like corporations chartered by the laws of New Hampshire and acting in Massachusetts, it was held that the contract was invalid in New Hampshire, and that an action there upon the premium note could not be maintained. *Id.*

See JOINT DEBTORS, 3.

CONSPIRACY.

1. AGREEMENT BY CREDITOR TO RECEIVE MONEY WHICH HIS DEBTOR HAD PROMISED TO ANOTHER is not a conspiracy, and his receipt of the money

will not render him liable in damages to the other creditor, though he knew of the promise which the debtor had made. *Benford v. Sanner*, 545.

2. DECLARATIONS OF PARTY JOINED AS DEFENDANT IN ACTION FOR CONSPIRACY are not admissible against co-defendant, if made after the alleged common design to defraud plaintiff has been accomplished; nor are they admissible against such co-defendant, until his connection with the common purpose has been shown *aliunde*. *Id.*
3. TELEGRAM FROM WIFE OF ONE OF DEFENDANTS IN ACTION FOR CONSPIRACY, not written nor sent by either of them, is inadmissible as evidence against them. As the declaration of the wife, it could not affect even her husband. *Id.*
4. ACTION AGAINST THREE, FOR FRAUDULENT CONSPIRACY TO OBTAIN CERTAIN DRAFTS, and to withhold proceeds from plaintiff. Where the evidence in such action failed to sustain the averments in the declaration as to the ownership of the drafts and the appropriation of the proceeds, knowing them to be the plaintiff's, or to establish any complicity on the part of C, one of the defendants, *held*, that the court erred in its refusal to charge the jury that they were bound to render a verdict of not guilty as to him. *Id.*
5. CONSPIRACY TO DEFRAUD BEING PROVED, whatever is shown to be done or said by any one of the conspirators in furtherance of the common design is the act or saying of all. *Page v. Parker*, 172.

CONSTITUTIONAL LAW.

See ATTORNEY AND CLIENT, 8; CORPORATIONS, 5, 6; DEEDS, 5.

CONTRACTS.

1. AGREEMENT, FOR GOOD CONSIDERATION, TO TRANSFER TO ANOTHER CERTAIN DRAFTS NOT YET RECEIVED, for services to be performed, is executory, and does not pass the property in the drafts. *Benford v. Sanner*, 545.
2. AGREEMENT TO RENDER SERVICES AS LOBBY AGENT, or to exert personal influence and solicitations to procure the passage of a public or private law by the legislature, is void as being prejudicial to sound legislation, and in contravention of public policy. *Powers v. Skinner*, 677.
3. AGREEMENT TO PAY FOR SERVICES IN CONDUCTING APPLICATION TO LEGISLATURE IS VALID, it seems, if made either to the legislature itself, or to some committee thereof, as a body. *Id.*
4. SERVICES IN PROCURING LEGISLATION SHOULD CLEARLY APPEAR TO BE LEGITIMATE, or they cannot be recognized as the basis of a legal claim. *Id.*
5. ONE WHO SIGNS INSTRUMENT IMPORTING OBLIGATION IS PRIMA FACIE BOUND BY IT, whether he signs at the right or the left hand of the paper, if there is no room for an inference that any other was intended to be the signer. *Steininger v. Hoch*, 521.
6. PRESUMPTION THAT ONE WHO SIGNS INSTRUMENT IMPORTING OBLIGATION IS BOUND BY IT DOES NOT EXIST where the signature occupies an equivocal position; as that of a subscribing witness to an instrument under seal, prepared for and executed by but one person. *Id.*
7. INSTRUMENTS SHOULD BE LIBERALLY CONSTRUED, in order to give them effect, and to carry out the intention of the parties. *Hunter v. Anthony*, 333.

8. INSTRUMENT SUSCEPTIBLE OF TWO CONSTRUCTIONS SHOULD RECEIVE THAT BY WHICH IT WILL TAKE EFFECT, where by the other construction it would be inoperative for want of a subject-matter to act on. *Id.*
9. CONTRACT CONTAINS AS PART OR CONDITION WHATEVER IS EXPECTED BY ONE PARTY, and known to be so expected by the other. *Jordan v. Dyer*, 668.
10. SUBSEQUENT RATIFICATION OF VOID CONTRACT BY PARTIES TO BE BOUND, coupled with their power to assent to the contract, will render it obligatory. *Hasbrouck v. City of Milwaukee*, 718.
11. TRUSTEES OF TOWN ARE NOT ENTITLED TO AFFIRMATIVE RELIEF OF RESCISSION OF CONTRACT of subscription to stock of railroad company, and of the cancellation of the bonds issued by them in payment for the stock, on the ground that the subscription was made and the bonds issued under a misapprehension or misconstruction of, and not in accordance with, the statute authorizing these acts, where the bonds have been delivered to the company, and assigned by them, and the interest accruing thereon has been paid for several years without objection, and there is no charge of fraud against the defendants; though the illegality of the bonds might be available and effectual as a defense against any holder. *Goslen v. Shoemaker*, 386.

See CORPORATIONS, 5; EQUITY, 1, 3; SET-OFF; SUBSCRIPTIONS.

CONVERSION.

See AGENCY, 7; ATTORNEY AND CLIENT, 1, 2; BAILMENTS, 5; SHERIFFS, 1, 2.

CORPORATIONS.

1. CORPORATIONS CANNOT TAKE RENTS AND PROFITS OF LAND UNDER POWER created by will, unless expressly authorized by the legislature to take land or interests therein by devise, but they may take money or personal property by testamentary gift, though raised by conversion of land under a power in the will. *Downing v. Marshall*, 290.
2. PROVISION IN CHARTER OF CORPORATION ENABLING IT TO TAKE LAND "by direct purchase or otherwise," is an express authority to take land or interests therein by devise. *Id.*
3. POWER OF MUNICIPAL CORPORATION TO ENGAGE IN WORKS OF INTERNAL IMPROVEMENT, such as building railroads, canals, harbors, etc., has been sustained on the ground that such works are matters of public concern, for which the taxing power might lawfully be called into action. *Hasbrouck v. City of Milwaukee*, 718.
4. MUNICIPAL CORPORATION CANNOT LAWFULLY ENGAGE IN WORKS OF PUBLIC IMPROVEMENT unless empowered by legislative authority to do so. *Id.*
5. CONTRACT OF MUNICIPAL CORPORATION, VOID FOR WANT OF CAPACITY IN EITHER PARTY to make it, cannot be given life and vitality by the legislature against the wishes of either of the parties to it. *Id.*
6. AUTHORITY TO ISSUE MUNICIPAL BONDS TO AMOUNT OF TEN THOUSAND DOLLARS for constructing a harbor, does not authorize municipality to construct a harbor at a greater expense, and a contract for such purpose, providing for a greater expenditure, is void as to the excess. *Id.*
7. MUNICIPAL CORPORATION'S POWER TO CONSTRUCT SEWERS THROUGH ITS STREETS IS SPECIAL LEGISLATIVE GRANT for private purposes, and is not a power given to the corporation for governmental purposes, or a

public municipal duty imposed upon it, as to keep its streets in repair, and the like. *City of Detroit v. Corey*, 78.

2. **MUNICIPAL CORPORATION TAKES POWER TO CONSTRUCT SEWERS THROUGH ITS STREETS WITH UNDERSTANDING** that the power shall be so executed as not unnecessarily to interfere with the rights of the public, and that all needful and proper measures shall be taken in its execution to guard against accidents to persons lawfully using the streets at the time. The corporation is bound for the performance of these obligations, and cannot rid itself of their performance by executing the power through agents. *Id.*

COSTS.

See **ARBITRATION AND AWARD**, 1.

CO-TENANCY.

1. **TENANT IN COMMON MAY MAINTAIN TRESPASS AGAINST CO-TENANT FOR MESNE PROFITS**, after a recovery in ejectment. *Critchfield v. Humbert*, 533.
2. **TENANT IN COMMON IS ENTITLED TO DAMAGES FOR USE AND OCCUPATION BY CO-TENANT**, from the time he became the owner, where he recovers the land in ejectment, and then brings an action for mesne profits. *Id.*
3. **OCCUPANCY BY ONE TENANT IN COMMON OF PARTICULAR PART OF COMMON PROPERTY**, by agreement of the others, is so far a severance in fact as to permit him to maintain trespass against them for the same acts which would constitute trespass in a stranger, even though the length of such occupation would be insufficient to mature an absolute legal title in severalty. *O'Hear v. De Goesbriand*, 653.

See **DOWER**, 2; **PARTITION**.

COUNTER-CLAIM.

See **SET-OFF**; **USE AND OCCUPATION**, 2.

COURTS.

1. **COURT MAY AMEND ITS RECORDS, AND MAKE THEM CONFORM TO FACTS** and truth of the case, even though twelve years have elapsed between the granting of a license and the making up of the record. *Frink v. Frink*, 189.
2. **COURT MAY RESTORE LEGAL PAPERS** which have been improperly altered or defaced, or may substitute new ones where the originals are stolen or lost. *Id.*
3. **AMENDMENTS OF RECORD MAY BE MADE ACCORDING TO MINUTES OF JUDGE**, or upon any competent legal evidence, and the court is the proper judge as to the amount and kind of evidence in each case. *Id.*
4. **CLERK MAY EXTEND RECORDS OF COURT**, but only from the process and pleadings on file, and from the minutes and entries on the docket, and not from any extrinsic evidence. *Id.*

CRIMINAL LAW.

1. **KILLING ASSAILANT MAY BE EXCUSABLE**, although it turn out afterwards that there was no actual danger, if it is done under a reasonable apprehension of loss of life or great bodily harm and the danger appears as

- imminent at the moment of the assault as to present no alternative of escaping its consequences but by resistance. *Logue v. Commonwealth*, 481.
2. **ERRONEOUS INSTRUCTION TO JURY, NAMELY**, that "to justify a killing in self-defense, it was necessary that an assault should have been committed by the person killed; that it was not enough that the party killed had a pistol in his hand, but that there must have been a presentation of it, or some demonstration of shooting;" and that "the having a drawn pistol in his hand, by deceased, would not be enough, although deceased had threatened to take the life of the prisoner, and those threats had been communicated to him." *Goodall v. State*, 396.
 3. **JURY MAY BE PROPERLY INSTRUCTED** that if they "believed from the evidence in the case that there was reasonable ground for A to believe his life in danger, or that he was in danger of great bodily harm from the deceased, and that such danger was imminent, and he did so believe, and acting on such belief killed the deceased, he was excusable; and that it was not necessary that he should wait till an assault was actually committed." *Id.*
 4. **REASONABLENESS OF APPEARANCES UNDER WHICH PARTY CLAIMS TO JUSTIFY TAKING LIFE** may properly be left to a jury, under the instructions of the court. *Id.*
 5. **NECESSITY OF PROVING JUSTIFICATION UPON CHARGE OF MURDER**, the killing being admitted, does not devolve upon the prisoner under Oregon statute. *Id.*
 6. **UNDER OREGON STATUTE, IN ALL TRIALS FOR MURDER, PROSECUTION MUST GO INTO PROOF OF FACTS AND CIRCUMSTANCES OF KILLING** in order to establish malice. *Id.*
 7. **AIDING GUILTY PARTY TO ESCAPE** after he has given another a mortal wound, but before death ensues, does not make the person giving such aid an accessory after the fact. *Harrel v. State*, 95.
 8. **INDICTMENT CHARGING BOTH BURGLARY AND LARCENY IS NOT DEMURRABLE FOR DUPLICITY.** *Breese v. State*, 340.
 9. **UPON VERDICT OF GUILTY OF BURGLARY AS CHARGED**, returned on indictment charging both burglary and larceny, the court may sentence for burglary, without awaiting a response to the charge of larceny. *Id.*
 10. **PERSON IS CONSTRUCTIVELY PRESENT AT BURGLARY, AND MAY BE INDICTED AND CONVICTED AS PRINCIPAL**, where he agreed with others to commit the burglary upon a store, and in order to facilitate the breaking and entry, and lessen the chances of detection, agreed on the night of the burglary to procure and decoy the owner away from the store in which he usually slept, to a house about a mile distant, and detain him there while the other confederates were breaking and entering the store and removing the goods, and the parties performed the respective parts of their agreement. *Id.*
 11. **FINDING ARTICLE BY DIRECTION OF OWNER, AND TAKING IT AS HIS BAILER**, but afterwards concealing it, and denying the finding, is but a breach of bailment, and not larceny. *State v. England*, 334.
 12. **WITNESS IS GUILTY OF PERJURY WHO TESTIFIES FALSELY TO MATERIAL FACT**, although he was not competent as a witness in the case, or to prove the particular fact concerning which he testified. So held, in an action for divorce, on the ground of adultery, where the husband, his wife having borne a child, testified falsely that he had had no sexual intercourse with her during their marriage. *Chamberlain v. People*, 255.

13. **ATTEMPT BY MALE PERSON OF SEVENTEEN YEARS AND UPWARD TO HAVE CARNAL CONNECTION** with a female child under the age of ten years, with her consent, is not indictable under a statute providing for the punishment of an assault with intent to commit rape, though another statute provides that "if any male person of the age of seventeen years and upward shall carnally know and abuse any female child under the age of ten years, with her consent, every such person so offending shall be deemed guilty of rape;" for an assault upon a consenting female, old or young, is a legal impossibility. *Smith v. State*, 355.
 14. **GENERAL BAD CHARACTER OF PROSECUTRIX FOR CHASTITY** may be shown upon trial for rape, but not particular instances of her unchaste conduct, unless such particular instances of unchastity show a criminal connection with the accused himself. *State v. Forshner*, 132.
 15. **INQUIRIES AS TO BAD CHARACTER FOR CHASTITY**, in cases both civil and criminal, where the character is regarded as involved in the issue, are limited to the time previous to the transaction in question. *Id.*
 16. **WITNESSES CALLED TO IMPEACH CHARACTER OF PROSECUTRIX FOR CHASTITY, UPON TRIAL FOR RAPE**, must confine their testimony to what they knew before the offense was committed. They will not be permitted to testify to any knowledge acquired afterwards. *Id.*
 17. **ACCESSARY AFTER FACT** IS ONE who aids, etc., another, after he has fully completed a felony. *Harrel v. State*, 95.
- See **ATTORNEY AND CLIENT**, 5-8; **EVIDENCE**, 2, 3; **INSANITY**; **WITNESSES**, 4.

CURTESY.

See **EXPECTANCY**, 1.

CY PRES.

See **CHARITIES**, 2, 3.

DAMAGES.

See **AGENCY**, 6; **CONSPIRACY**, 1; **EMINENT DOMAIN**, 2; **ENCROACHMENTS**, 1, 2; **EXERCUTIONS**, 11; **MINES AND MINING**, 2; **REFLEVIN**, 2; **SALES**, 13, 15; **SHERIFFS**, 3, 4; **TRESPASS**, 1.

"DANGERS OF THE RIVER."

See **COMMON CARRIERS**, 4, 5.

DEBT.

See **ASSUMPSIT**, 2.

DEBTOR AND CREDITOR.

1. **INSOLVENT DEBTOR MAY PREFER ONE CREDITOR TO ANOTHER BY JUDGMENT or deed**, in any mode except by an assignment in trust, if his motive be to pay the preferred debt, although the creditors not preferred may be thereby delayed or wholly prevented from obtaining payment. *York County Bank v. Carter*, 494.
2. **INFERENCE THAT SALE WAS INTENDED TO DELAY OR DEFRAUD UNPREFERRED CREDITORS** of the vendor cannot be drawn from the mere fact that such sale necessarily gave a preference to the creditors whose debts were provided for by it, to the exclusion of creditors not so provided for,

where the price agreed to be paid was the full value of the property at the time, and the purchase-money was intended by both seller and buyer to be applied to the payment of particular debts of the seller. *Id.*

3. COURT WILL LOOK BEHIND FORM OF SECURITY to ascertain real nature of debt. *Weymouth v. Sanborn*, 144.

See CONSPIRACY, 1; ESTATES OF DECEDENTS, 1-4; EXECUTIONS; FRAUDULENT CONVEYANCES; PARTNERSHIP.

DEDICATION.

See ADVERSE POSSESSION, 8; EXECUTIONS, 2.

DEEDS.

1. LAND WHICH IS ESSENTIAL TO USE OF BUILDING PASSES BY CONVEYANCE OF BUILDING, if it appears that such was the intention of the parties. *Wilson v. Hunter*, 795.
2. DEED CREATES SIMPLY LICENSE TO ERECT AND OCCUPY BUILDINGS, and to use water for them, in addition to conveying an undivided interest in all the premises, and this right expires with the decay of the buildings, where, after granting an undivided one half of the premises, the deed gives the grantee "the right to put in a mechanic's shop and planing-mill between the saw-mill and grist-mill, and to take water from the flume for the same, so as not to interfere with the use of the water for the saw and grist mills, or such machinery as may be substituted for them." *Baldwin v. Aldrich*, 695.
3. PROPERTY CONVEYED BY DEED OR OTHER INSTRUMENT IS SUFFICIENTLY DESCRIBED where reference is made therein to another deed or writing, which is accurately pointed out, which contains a proper description, and in which it is said that such is the property sold or intended to be sold. Such a conveyance is not ambiguous or uncertain, because the means of ascertaining the true intention of the parties are clearly indicated on the face of it. *Newman v. Tymeson*, 735.
4. RECORD OF DEED EXECUTED IN PRESENCE OF ONE WITNESS only is inadmissible in evidence under a statute requiring that every conveyance of lands shall be executed in the presence of two witnesses. Such requirement is imperative, and must be complied with to give the instrument any validity as a conveyance. *Meighen v. Strong*, 441.
5. WHERE THERE HAS BEEN ACTUAL CONVEYANCE OF LAND, defectively executed, the legislature may cure the defect, so far, at least, as to bind the parties thereto, or if the defect relates merely to the evidence by which the conveyance is to be established, the rule of evidence may be so changed as to enable that to be shown which, without such change, would have been insufficient; and this would be binding upon all who subsequently acquire title with knowledge of the former conveyance. *Id.*
6. WHEN, AS IN MINNESOTA, STATUTE PRESCRIBES MANNER in which only a conveyance of real property by deed can be made, any attempt to convey without complying with the requisites of the statute must be treated as a mere nullity; and the legislature could not give it validity, so as to affect persons who may have subsequently acquired title to the property, without divesting them of rights which they had legally acquired. *Id.*

See ACKNOWLEDGMENTS; CONDITIONS; EVIDENCE, 1; EXECUTORS AND ADMINISTRATORS, 6; EXPECTANCY, 2; FRAUDULENT CONVEYANCES.

DEVISES.

See CHARITIES; CORPORATIONS, 1, 2; WILLS.

DOWER.

1. COURT OF EQUITY CANNOT, unless it is impossible to assign dower, decree a sale of the whole property, and provide a moneyed compensation, in lieu of dower, against the widow's will; however much it might be to the interests of the heirs to have a sale of the whole estate, and a moneyed compensation allowed the widow. *White v. White*, 706.
2. WIDOW ENTITLED TO DOWER is neither joint tenant, coparcener, nor tenant in common with the heirs at law, within the meaning of the Virginia statute concerning partition, so as to empower a court of equity to sell the whole estate against her will, and without her consent, and compel her to receive a moneyed compensation in lieu of dower. *Id.*

DYING DECLARATIONS.

See EVIDENCE, 2, 3.

EASEMENTS.

See HIGHWAYS, 2.

EJECTMENT.

See CO-TENANCY, 1, 2; USE AND OCCUPATION, 1.

EMINENT DOMAIN.

1. WHETHER LAND SELECTED BY RAILROAD COMPANY FOR ITS TRACK is NECESSARY for its use, or whether other lands adjoining cannot be as conveniently occupied for that purpose, is not a judicial question to be determined by the court, but is a question of discretion to be determined by the company, proceeding in the manner prescribed by law. *Ford v. Chicago etc. R. R. Co.*, 791.
2. PAST DAMAGES CAUSED TO OWNER OF LOT BY RAILROAD COMPANY'S TEARING UP STREET without making compensation, may be assessed by the court or by a jury; but the permanent damages which will accrue to the owner by the continued use of the land by the company can only be ascertained in the manner prescribed by the statute. *Id.*

See EXECUTIONS, 1.

ENCROACHMENTS.

1. PERSON IS ENTITLED TO RECOVER DAMAGES FOR ANY ENCROACHMENT BY ANOTHER ON HIS LEGAL RIGHTS, to the extent of the injury thereby sustained. *Hutchinson & Rourke v. Schimmelfeder*, 582.
2. PERSON OWNING LOT LYING BELOW GRADE OF STREET ON WHICH IT FRONTS, in grading up to street, must confine the earth within his own line; and if a person owning an adjoining lot has built a wall and erected a house thereon within his own line, the former can neither build to the wall nor throw earth against it; and if he does so, he is responsible in damages. *Id.*

EQUITY.

1. WHERE ALL PARTIES CONCERNED IN ALLEGED ILLEGAL TRANSACTION HAVE PARTICIPATED IN THAT ILLEGALITY, though it may be available

- as a defense, it by no means follows that it can be made ground for affirmative relief, which is dependent upon the discretion of the court, such as the rescission of an executed contract, though there may be exceptions where the law offended has been made to prevent oppression, and the oppressed party is seeking relief, or where public policy will be advanced by allowing the relief. *Goshen Township v. Shoemaker*, 386.
2. **EQUITY AFFORDS NO RELIEF TO PARTY WHO HAS LOST HIS REMEDY AT LAW** through mere ignorance of fact, the knowledge of which he might have obtained by due diligence, where there is neither mistake, accident, nor fraud. *Fahie v. Pressey*, 401.
 3. **LACHES AND ACQUIESCENCE WILL PREVENT PERSON FROM SEEKING, IN EQUITY, RESCISSION OF CONTRACT**, on the ground of alleged illegality in which both parties have participated, though such acquiescence will confer no right on the other party. *Goshen Township v. Shoemaker*, 386.
 4. **BILL IN EQUITY TO ENJOIN ERECTION OF LIVERY STABLE, WITH PRAYER FOR GENERAL RELIEF**, and alleging that the stable, by its proximity, will render the complainant's house untenable, break up his business, and diminish the rents of his stores, is not demurrable for want of equity. *Aldrich v. Howard*, 636.
- See **BANKS AND BANKING**, 2; **COLLATERAL SECURITIES**; **DOWER**; **ESTOPPEL**; **EVIDENCE**, 9; **EXPECTANCY**, 2; **MARRIED WOMEN**, 1; **MISTAKE**; **PARTNERSHIP**, 4, 9, 25-27; **REGISTRATION**; **VENDOR AND VENDEE**, 7.

ESTATES OF DECEDENTS.

1. **PROBATE OF CLAIMS AGAINST DECEDENT** must be made upon the affidavit of the creditor in the form prescribed by law, otherwise it will be void, and will not be a sufficient voucher for its payment. *McWhorter v. Donald*, 97.
 2. **PARTY WHO PAYS DEBT OF DECEDENT IN HIS LIFE-TIME** cannot probate the amount so paid in an account in his own favor by his own affidavit merely, but must show by other proof that such payment was made at the request of decedent. He ought to have the affidavit of the original creditor showing the debt to be just and true. *Id.*
 3. **CREDITOR'S OWN AFFIDAVIT TO HIS CLAIM AGAINST ESTATE OF DECEDENT IS ESSENTIAL TO ITS ALLOWANCE**. An affidavit made by others is not sufficient, even though the affiant be the husband of claimant. *Id.*
 4. **AFFIDAVIT OF CREDITOR OF INTESTATE** must not only state, to establish his claim, that it is just and true, but also that it is not paid, and that no security, or satisfaction or security, has been received therefor. *Id.*
- See **EXECUTORS AND ADMINISTRATORS**; **PARTITION**, 5, 6; **WILLS**.

ESTATES FOR LIFE

1. **TENANT FOR LIFE OF LOWER ROOMS OF HOUSE AND CHAMBERS ABOVE** is not obliged to share in the expenses of repairing the roof of the building, unless incurred at his request. *Wiggin v. Wiggin*, 192.
2. **TENANT FOR LIFE OF CERTAIN ROOMS OF HOUSE MAY LET** such rooms, and retain the money received as rent. *Id.*

ESTOPPEL

1. **EQUITABLE ESTOPPEL, WHAT CONSTITUTES**.—When one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own

previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. *Drew v. Kimball*, 163.

2. ESTOPPEL IS NOT CREATED BY ADMISSIONS which are not acted upon, and are not such as would produce injury to the party to whom they are made. *Driskell v. Mateer*, 105.
3. REPRESENTATIONS ARE TO BE REGARDED AS "WILLFUL" when the person making them means them to be acted upon, or if, without regard to intention, he so conducts himself that a reasonable man would take the representation to be true, and believe it was meant that he should act upon it. *Drew v. Kimball*, 163.
4. TO CONSTITUTE ESTOPPEL, IT IS NOT NECESSARY TO SHOW THAT PERSON MAKING REPRESENTATION DESIGNED TO INDUCE PARTICULAR PERSON who sets it up as an estoppel to act upon it as true. It is enough that he should hold out to all who have occasion to act the existence of a certain state of facts which they might assume to be true, and act upon accordingly. *Id.*
5. TO CONSTITUTE ESTOPPEL, IT IS OF NO IMPORTANCE WHETHER DECLARATIONS OR ADMISSIONS BE MADE IN EXPRESS LANGUAGE to person himself who sets them up as an estoppel, or are implied from the open and general conduct of the party; as the implied declaration may be considered as addressed to every one in particular who may have occasion to act upon it. *Id.*
6. "CREDITOR'S POSITION IS CHANGED" BY ATTACHMENT, WITHIN MEANING OF LAW OF ESTOPPEL. Where A is clothed by B with all indications of ownership to property, and A's creditor acts upon that fact and attaches the property as A's, it will be such a change of his position as to estop B from denying the truth of his representations that it was A's property. *Id.*
7. ESTOPPEL.—Where A put cattle into B's possession to sell, with an agreement that they should be held out as B's cattle, the better to effect a sale, and B represented to one of his own creditors that he had bought the cattle of A, and the creditor, acting upon this representation, attached the cattle as B's, A was held to be estopped to set up property in himself against such creditor, although B, at the time of the attachment, informed the officer that the cattle belonged to A. *Id.*

See BOUNDARIES: HUSBAND AND WIFE, 13; MARRIED WOMEN, 2.

EVIDENCE.

1. ADMISSION OR DECLARATION OF GRANTOR MADE AFTER CONVEYANCE is not admissible against his grantee. *Beeckman v. Montgomery*, 229.
2. DYING DECLARATIONS, OR THOSE WHICH ARE PART OF RES GESTÆ, are the only declarations of the deceased which are competent evidence. *Goodall v. State*, 396.
3. DYING DECLARATIONS ADMITTED IN EVIDENCE MAY BE DISCREDITED by showing that the deceased was a disbeliever in a future state of rewards and punishments. *Id.*
4. EVIDENCE OF SURROUNDING CIRCUMSTANCES IS ADMISSIBLE to enable the court to put itself in the place of the party, where doubt arises as to the meaning of a written instrument. *French v. Hayes*, 127.
5. DECLARATION OF PARTY IS ADMISSIBLE TO DETERMINE TO WHICH OF TWO PARTS an ambiguous description in an instrument is intended to apply. *Id.*

6. **EXAMINATION OF DEFENDANT IN EXHIBITION** is not admissible in evidence against one claiming under him by a prior grant. *Beckman v. Montgomery*, 229.
 7. **OPINIONS OF WITNESSES RELATIVE TO DUTY OF TENDER OF DRAW-BRIDGES** are inadmissible in an action against him for injuries caused by the improper discharge of his duties. *Nowell v. Wright*, 62.
 8. **CHARACTER FOR CARE, SKILL, AND TRUTH MUST BE PROVED BY EVIDENCE OF GENERAL REPUTATION**, and cannot be established by proof of special acts. *Fraser v. Pennsylvania R. R. Co.*, 467.
 9. **RECORD OF SUIT IN EQUITY, WHICH IS PART OF RES GESTÆ, IS COMPETENT EVIDENCE** for plaintiff upon trial of action, although the defendant in the action was not a party to the proceedings in equity. *Patterson v. Anderson*, 579.
 10. **PARTY MAY GIVE PAROL EVIDENCE OF CONTENTS OF PAPER**, if opposite party fails to produce the paper upon the trial, after being notified to do so. *West Branch Ins. Co. v. Helfenstein*, 573.
- See **ACKNOWLEDGMENTS**, 1; **ADVERSE POSSESSION**, 4-6; **AGENCY**, 2; **CONSPIRACY**, 2-4; **CONTRACTS**, 6; **COURTS**, 3, 4; **CRIMINAL LAW**, 5, 6; **DEEDS**, 4, 5; **EXECUTIONS**, 10, 11; **EXPECTANCY**, 1; **NEGOTIABLE INSTRUMENTS**, 21; **PLEADING AND PRACTICE**, 5-10; **SALES**, 20; **TRUSTS**, 2; **VENDOR AND VENDEE**, 8, 9; **WITNESSES**.

EXECUTIONS.

1. **RAILROAD COMPANY'S LANDS ARE EXEMPT FROM LEVY AND SALE** under judgments against it, when the lands are appropriated to corporate objects, and are necessary for the full enjoyment and exercise of any franchise of the company, whether the lands are acquired by purchase, or by the exercise of the power of eminent domain. Sequestration is the only remedy. *Plymouth R. R. Co. v. Colwell*, 526.
2. **RAILROAD COMPANY'S LANDS, NOT ACTUALLY DEDICATED TO CORPORATE PURPOSES**, are bound by lien of judgments against the company, and are liable to levy and sale thereunder, in the same manner and with the same effect as the lands of any other debtor. *Id.*
3. **CANAL BASIN, PURCHASED BY RAILROAD, IS SUBJECT TO LEVY AND SALE ON EXECUTION** against the company, where the railroad has no authorized canal connection. It is not a legitimate incident of the railroad. *Id.*
4. **SHERIFF LEVYING UPON PERSONAL PROPERTY** of a judgment debtor must, within a reasonable time, take such possession thereof as will apprise every one that it has been taken in execution. Such property so taken must be sold publicly after public notice given. *Parys & Co.'s Appeal*, 615.
5. **IF JUDGMENT CREDITOR ENTERS INTO ARRANGEMENT WITH HIS DEBTOR** to permit the latter and a sheriff's keeper to remain in possession and sell the goods at private sale during the time the property is being advertised for sale by the officer, his execution will be postponed and a junior writ will be first satisfied out of the goods. *Id.*
6. **SHERIFF IS NOT REQUIRED TO STATE IN HIS RETURN** the particular facts constituting a levy; a general return, that he has "levied upon" the property is sufficient, and cannot be disputed, except in a direct proceeding against the officer or his sureties for a false return. When the judgment is a lien upon real property, a formal levy upon such property is not required, and the provision of the statute, that "until a levy prop-

erty is not affected by the execution," applies to a levy upon personal property only. *Folsom v. Carl*, 429.

7. **PURCHASE BY ATTORNEY, AT SHERIFF'S SALE, UNDER EXECUTION OF WHICH HE HAS CONTROL**, is considered by the law as in the twilight between legal fraud and fairness, and should be deemed fraudulent, or in trust for the parties concerned in the sale, upon slight additional facts. *Jones v. Martin*, 641.
8. **IT IS SCARCELY POSSIBLE TO MAKE FAIR SALE OF PROPERTY FOR FULL VALUE**, the sale being in gross, pursuant to a levy upon a mass of property, without any specific description, and embracing undefined and unascertained interests. And the fact of such sale, under such a levy, in connection with the fact that the purchaser was the attorney of the plaintiff in execution, having control of the execution and levy, are sufficient to annul the sale, or to constitute the purchaser a trustee, holding the title in trust for the parties concerned. *Id.*
9. **MORTGAGEE OF LAND UNFAIRLY SOLD UNDER EXECUTION**, whose mortgage was junior to the judgment, has the right to intervene, and pray a foreclosure, in a suit by the party whose property was so sold, brought to annul the sale; and if either the sheriff or his deputy fraudulently combined with the purchaser at the sale, to the prejudice of the plaintiff's right, he may properly be made a party to the suit. *Id.*
10. **PARTY MAY ALLEGE AND PROVE, IN SUIT BROUGHT FOR CANCELLATION OF UNFAIR SALE OF HIS LANDS UNDER EXECUTION**, that it was agreed between himself and the purchaser at the sale, defendant in suit, that the latter should buy in the property for the benefit of the former, and give him time to redeem; and evidence of such an agreement should be admitted, although the party apparently acquiesced in the mode of making the sale. *Id.*
11. **EVIDENCE IN ABATEMENT OF DAMAGES** that part of proceeds of execution was applied in payment of plaintiff's rent in arrear is not admissible in an action of trespass for a wrongful levy upon personal property. *Graham v. McCreary*, 591.

See **ATTACHMENTS**, 5; **EXEMPTIONS**; **JUDGMENTS**, 4; **PARTNERSHIP**, 20, 24; **REPLEVIN**, 3; **SHERIFFS**; **WITNESSES**.

EXECUTORS AND ADMINISTRATORS.

1. **EXECUTOR RENOUNCING HIS OFFICE IS DEEMED TO HAVE ALSO RENOUNCED TRUSTS** conferred by the will, which are personal and discretionary, especially where the renunciation is followed by many years of total non-interference with the estate. *Beekman v. Bonsor*, 269.
2. **IT IS NOT DEFENSE TO ALLEGATION** charging an administrator with waste, etc., to deny that the administrator had not wasted or misapplied the assets as alleged. He must show some good reason why he did not do what appears by the declaration to be his duty. *Cannon v. Cooper*, 101.
3. **EXECUTOR MAY MAINTAIN INDEBITATUS ASSUMPSIT** on the common counts when the money sought to be recovered is part of the assets of plaintiff's testator, and it is the duty of defendant to pay it over to plaintiff. In such case, he need not declare in trover. *Larson v. Larson*, 702.
4. **EXECUTOR MUST DECLARE IN HIS REPRESENTATIVE CHARACTER** when he sues in respect to a cause of action which accrued in the life-time of his testator. *Id.*

5. **EXECUTOR MAY DECLARE IN HIS OWN NAME**, or in his representative character, when the cause of action accrued after the death of his testator and the money if recovered would be assets. *Id.*
6. **DEED FROM ADMINISTRATOR OF LAND OF HIS INTESTATE, BY HIM SOLD UNDER ORDER OF PROBATE COURT**, voidable for fraudulent collusion between the administrator and the purchaser, may be impeached only by a subsequent administrator, or by the heirs or devisees, and is valid to all intents as to all other persons. *Pearson v. Burditt*, 649.
7. **WHEN ACTION IS REVIVED IN HIGH COURT OF ERRORS** against an administrator, he becomes a party to it for all purposes, and if it is remanded to a lower court, he is a party to said action in such lower court. It is unnecessary, in such case, for the lower court to enter any further order of revival against him. *Cannon v. Cooper*, 101.

See CHARITIES, 3, 4; PARTNERSHIP, 19; SALES, 2.

EXEMPTIONS.

1. **JUDGMENT DEBTOR FORFEITS RIGHT TO BENEFIT OF EXEMPTION LAW** by falsely denying the ownership of his property, thereby hindering and delaying the sheriff in the collection of the debt, although the falsehood was uttered for the purpose of gaining time for the payment of the debt. The sheriff being the creditor's legal agent, a false representation that hinders the sheriff hinders the creditor. *Strouse's Executor v. Becker*, 474.
2. **DEBTOR MUST CLAIM EXEMPTION AGAINST EVERY EXECUTION CREDITOR**, and if he do not, there is nothing to prevent one execution creditor from levying on goods that have been appraised and set apart under the process of another creditor. *Id.*
2. **ATTACHMENT EXECUTION IS EXECUTION PROCESS**, and exemption may be claimed against a creditor proceeding by such process as effectually as against a creditor who comes with an execution in the ordinary form. *Id.*
4. **TERRE-TENANT IS NOT "DEFENDANT" OR "DEBTOR,"** WITHIN MEANING OF EXEMPTION LAW which uses those terms. *Eberhart's Appeal*, 536.
5. **RIGHT OF EXEMPTION IS PERSONAL**, and is not vendible or assignable. *Id.*
6. **UNDER MINNESOTA HOMESTEAD EXEMPTION LAW**, as it existed prior to 1860, "where a judgment was rendered and the property sold, the lien of the judgment attached to the homestead as well as other real property of the judgment debtor, and the exemption applied only to a sale on execution while the homestead was occupied by the debtor or his family, but did not affect the lien:" therefore a grantee of the judgment debtor took the property subject to the lien of the judgment. *Folsom v. Carl*, 429.

See EXECUTIONS, 1; HOMESTEADS.

EXPECTANCY.

1. **WIFE'S DECLARATIONS MADE SHORTLY AFTER BIRTH OF CHILD**, that it had been born alive, are not competent evidence to establish her husband's title to an estate by the curtesy. *Gardner v. Kotts*, 831.
2. **CONVEYANCE OF ESTATE IN EXPECTANCY IS INOPERATIVE AT LAW**, but may be enforced in equity as an executory agreement to convey, if it be sustained by a sufficient consideration. *Bayler v. Commonwealth*, 551.
3. **WIFE'S MORTGAGE OF HER EXPECTANT INTEREST IN HER FATHER'S ESTATE**, upon his death, to secure an antecedent debt of her husband, will not be enforced, the mortgagee not being a purchaser for value. *Id.*

FENCES.

OWNER IS UNDER NO OBLIGATION TO FENCE HIS LAND ALONG HIGHWAY in Vermont; except that it is his duty to restrain his own cattle from trespassing upon his neighbors. *Holden v. Shattuck*, 684.

See AGENCY, 6; CONDITIONS, 3.

FORFEITURES.

See CONDITIONS, 1, 3; VENDOR AND VENDEE, 7.

FORGERY.

See NEGOTIABLE INSTRUMENTS, 9.

FRAUD.

See ACKNOWLEDGMENTS, 3, 4; ADVERSE POSSESSION, 1; EQUITY; FRAUDULENT CONVEYANCES; PLEADING AND PRACTICE; PUBLIC LANDS, 3; SALES, 5-20; SET-OFF; VENDOR AND VENDEE, 6.

FRAUDULENT CONVEYANCES.

1. CONVEYANCES ON THEIR FACE IMPORTING SALE, AND NOT CREATION OF TRUST for the benefit of creditors, may be shown by parol evidence to have been intended to create a trust for creditors, but whether or not they were so intended, is a question for the jury, and not for the court. *York County Bank v. Carter*, 494.
2. VOLUNTARY CONVEYANCE MADE IN CONTEMPLATION OF FUTURE INDEBTEDNESS by one who is not then indebted, is nevertheless fraudulent and void as against subsequent creditors whose debts are contracted immediately or so soon as to warrant a presumption that the debt was made in contemplation of such indebtedness. *Beeckman v. Montgomery*, 229.

GARNISHMENT.

See ATTACHMENTS, 5.

GIFTS.

DELIVERY IS SUFFICIENT TO RENDER VALID GIFT TO MARRIED WOMAN of household furniture in the possession and use of herself and family, where one who has just purchased under a chattel mortgage made by her husband, pointing out certain of the articles to the wife, says to her: "I give you these, and all the property I have purchased this day;" and such property remaining after the gift, in the house occupied by the husband and wife together, is to be deemed in the possession of the wife, and not liable to execution against the husband. *Allen v. Cowan*, 316.

See CHARITIES; UNINCORPORATED SOCIETIES.

GRANTS.

See ADVERSE POSSESSION, 6; EVIDENCE, 1, 6.

HIGHWAYS.

1. **OWNER OF LAND THROUGH WHICH HIGHWAY IS ESTABLISHED RETAINS** FEE of the soil embraced within its limits, with the full right to its enjoyment in any manner not inconsistent with the enjoyment of the eas-

ment by the public for the purpose of a highway, and this right is exclusive against all other persons. *Holden v. Shattuck*, 684.

2. OWNER OF LOT BOUNDED BY PUBLIC STREET WITHIN RECORDED TOWN PLAT OR VILLAGE TAKES TO CENTER of the street, and owns the soil subject to the public easement. *Ford v. Chicago etc. R. R. Co.*, 791.
3. RAILROAD COMPANY CANNOT APPROPRIATE AND OCCUPY PUBLIC STREET with the track of its road, without the consent of proprietors of lots bounded by such street, or without compensation made to them, and neither the legislature nor the municipal authorities have any power to dispense with the making of such compensation. *Id.*
4. RAILROAD COMPANY MAY BE RESTRAINED BY INJUNCTION FROM LAYING ITS TRACK IN PUBLIC STREET, without first taking steps to acquire the right of way by the assessment and payment of damages to the owners of lots bounded by the street. *Id.*
5. THERE IS NO MORE INCONSISTENCY IN PRESUMING RECORD OF DISCONTINUANCE OF HIGHWAY TO BE LOST than there is in presuming lost deed, or release, or grant, or, especially, in presuming a charter or act of incorporation to have been lost. *Webber v. Chapman*, 111.
6. PRESCRIPTIVE RIGHT TO LAND OF HIGHWAY MAY BE ACQUIRED BY INDIVIDUAL who incloses it and occupies it adversely, uninterruptedly, and under a claim of right for more than twenty years. This right may be thus acquired against the public, and all persons claiming or justifying under any public right or easement in such highway. *Id.*

See AGENCY, 5, 6; ANIMALS; ADVERSE POSSESSION, 8; FENCES, 1.

HOMESTEADS.

1. PROMISSORY NOTE GIVEN FOR LABOR DOES NOT CHANGE CHARACTER OF CLAIM, and the "claim for labor" is still within the exception of section 5 of the homestead act. *Weymouth v. Sanborn*, 144.
2. PROFESSIONAL SERVICES OF PHYSICIAN DO NOT CONSTITUTE "CLAIM FOR LABOR," within the meaning of section 5 of the homestead act of New Hampshire. *Id.*
3. PROMISSORY NOTE EXECUTED BY DEBTOR AND HIS WIFE IS NOT RELEASE OR WAIVER OF EXEMPTION under the homestead act of New Hampshire, where no mortgage of the homestead is executed by them to secure such note. *Id.*

See ACKNOWLEDGMENTS, 3; EXEMPTIONS, 6.

HOMICIDE.

See CRIMINAL LAW, 1-7.

HUSBAND AND WIFE.

1. HUSBAND IS LEGALLY BOUND FOR NECESSARIES SUPPLIED TO WIFE so long as she does not violate her duty as wife. *Morrison v. Holt*, 120.
2. IF HUSBAND DOES NOT HIMSELF PROVIDE FOR WIFE'S SUPPORT, HE IS LEGALLY LIABLE FOR NECESSARIES furnished her, even though against his orders. *Id.*
3. LEGAL EXPENSES ARE DEEMED NECESSARIES where the conduct of the husband has rendered them necessary for the personal protection and safety of the wife. *Id.*
4. WIFE'S AUTHORITY TO BIND HER HUSBAND FOR NECESSARIES IS IMPLIED, because of the marital relation, and depends upon the necessity of the expenditures for her support, or protection as wife. *Id.*

5. **HUSBAND IS NOT LIABLE TO ATTORNEY FOR PROFESSIONAL SERVICES RENDERED HIS WIFE** in prosecuting a divorce suit against him upon the ground of adultery. *Id.*
6. **LAND PURCHASED BY HUSBAND IN WIFE'S NAME IS DEEMED PRIMA FACIE** to be intended as a provision for the wife, so as to rebut the presumption of a resulting trust to the husband. *Dickinson v. Davis*, 202.
7. **WHERE HUSBAND PURCHASES LAND IN HIS WIFE'S NAME**, proof that part of the purchase-money belonged to the husband will not make the wife chargeable as his trustee. *Id.*
8. **WHERE MONEY RAISED BY MORTGAGE OF WIFE'S LAND IS HELD BY HER**, and the husband has not assumed the mortgage debt, or attempted to control the money borrowed, she is not liable in foreign attachment as trustee of her husband on account of such money. *Id.*
9. **AT COMMON LAW, WIFE COULD NOT BE TRUSTEE OF HER HUSBAND.** *Id.*
10. **HUSBAND HAS AT MOST BUT LIFE ESTATE IN WIFE'S LANDS**, and upon their sale the whole proceeds belong to the wife, unless reduced to possession by her husband. *Id.*
11. **DEED OF SLAVES IN TRUST to A for life**, and after her death to B, and the heirs of her body forever, but should B die without heir or heirs of her body, then to C, with a further limitation over, does not create a separate estate in B, and upon her marriage the marital rights of her husband attach to such interest as she took under the deed, and such interest should be disposed of, as was the other personal estate of the husband after his death. *White v. White*, 706.
12. **FAILURE OF WIDOW TO MAKE EXPRESS CLAIM** to perishable personal estate of her deceased husband does not bar her right to her distributable share of the proceeds of a sale thereof. *Id.*
13. **WIFE IS NOT ESTOPPED BY HER MERE SILENCE FROM AFTERWARDS ASSERTING HER RIGHTS**, where land in fact belonging to her, but supposed to belong to her husband, is sold under decree of foreclosure, the wife not having been served in the suit; nor is she to be regarded as having ratified the proceedings by the acceptance of a part of the purchase-money of the sale, but in such case must be taken to have acted as the agent of and subject to the control of her husband. *Fahie v. Pressey*, 401.
14. **WIFE IS NECESSARY PARTY TO FORECLOSURE SUIT**, and must be duly served with process in such suit, she being the legal owner of the mortgaged property. *Id.*

See **ACKNOWLEDGMENTS**, 2-4; **DOWER**; **EXPECTANCY**, 1; **GIFTS**; **WITNESSES**, 3, 4.

IDEM SONANS.

1. **PRINCIPLE OF IDEM SONANS IS IN GENERAL APPLICABLE TO NAMES SIMILARLY PRONOUNCED**, but does not apply to the entry of the defendant's name on the judgment docket, where the name is differently spelled, as, for instance, Joest for Yoest. *Heil & Lauer's Appeal*, 590.
2. **JUDGMENT AGAINST "JOHN BOBB" IS LIEN ON LANDS OF "JOHN BUBB"**, both forms being the same in sound, according to the pronunciation prevailing. *Myer v. Fegaly*, 534.

INDEMNITY.

See **BANKS AND BANKING**, 6.

INDICTMENTS.

See CRIMINAL LAW, 8-10; INSANITY.

INEVITABLE ACCIDENT.

See COMMON CARRIERS, 4.

INJUNCTIONS.

See HIGHWAYS, 4; TRADE-MARKS; NUISANCE, 1.

INSANITY.

WHERE INSANITY IS SET UP AS DEFENSE TO INDIOTMENT FOR CRIME, the jury ought not to return a verdict of guilty if they have a reasonable doubt as to the soundness of the prisoner's mind and his capacity to commit the crime. *State v. Bartlett*, 154.

INSOLVENCY.

See AGENCY, 1; DEBTOR AND CREDITOR, 1.

INSTRUCTIONS.

See CRIMINAL LAW, 2, 3; PLEADING AND PRACTICE, 6-9.

INSURANCE.

1. CONDITION IN POLICY OF INSURANCE AGAINST ASSIGNMENT AFTER LOSS would be void, as inconsistent with the covenant of indemnity, and as contrary to public policy. *West Branch Ins. Co. v. Helfenstein*, 573.
2. LAW OF LEGAL RELATION BETWEEN INSURERS AND ASSURED IS POLICY OF INSURANCE, with its clauses, conditions, and stipulations, by which the mutual rights and liabilities of the parties are to be understood and measured. *Id.*
3. POLICY OF INSURANCE UPON MERCHANDISE TO BE USED FOR TRAFFIC ATTACHES TO SUBSEQUENT PURCHASES THEREOF, and is an indemnity against the loss of the stock in the possession of the assured at the time of a fire. *Id.*
4. CONDITION IN POLICY FORBIDDING TRANSFER OF TITLE IN PROPERTY INSURED, without assent of insurers, is not broken by a demise of part of the insured premises. *Id.*
5. NOTICE OF LOSS TO SECRETARY OF COMPANY IS SUFFICIENT, if transmitted in writing by local agent of company, upon information conveyed to him by the assured. Requirement that notice of loss be given to the secretary of the company by the assured, in writing, is thus satisfied. *Id.*
6. ASSURED MUST EXERCISE DUE DILIGENCE IN VIEW OF ALL CIRCUMSTANCES OF CASE, under a condition that notice of loss be given to the company forthwith. *Id.*
7. THAT NOTICE OF LOSS SHALL BE GIVEN WITHIN LIMITED TIME is a valid stipulation in a policy of insurance. This clause may be inserted in the policy itself, or contained in the charter of the company. In either case, it is a condition precedent. *Patrick v. Farmers' Ins. Co.*, 197.
8. DEFECT IN TIME OF GIVING NOTICE STANDS ON DIFFERENT GROUND FROM DEFECT IN ITS MATTER. The defect, upon notice, may be remedied, but it is otherwise as to the time, which is necessarily irremediable, if the insurer chooses to insist upon it. *Id.*

9. **VOTE BY DIRECTORS OF INSURANCE COMPANY TO INDEFINITELY POSTPONE SUBJECT OF LOSS WILL BE CONSTRUED** as a refusal to allow anything on account of it, rather than as a refusal to ascertain and determine the amount of the loss or damage. *Id.*
10. **CONDITION IN POLICY OF INSURANCE REQUIRING NOTICE OF LOSS TO BE GIVEN WITHIN THIRTY DAYS** is not waived by a vote of the directors of an insurance company to indefinitely postpone the subject of a loss which is construed as a refusal to allow anything on account of it. *Id.*
11. **STIPULATION IN POLICY OR BY-LAW OF INSURANCE COMPANY, THAT NO RECOVERY SHALL BE HAD UNLESS SUIT IS BROUGHT** within a certain time is a valid condition, and unless it is complied with, there can be no recovery. Such a stipulation is in the nature of a condition precedent to the company's liability. *Id.*
12. **ONE INSURED CANNOT RECOVER FOR LOSS IF HE HAS FAILED TO GIVE NOTICE OF IT**, in compliance with the charter of the insurance company as to time, and neglects to commence his action within the time limited by the charter. *Id.*
13. **NOTICE BY PAROL TO AGENT OF INSURANCE COMPANY IS OF NO EFFECT**, where the charter contains a condition requiring notice of the loss to be given in writing to the secretary, or one of the directors. *Id.*

See CONFLICT OF LAWS.

INTEREST.

See WILLS, 2, 3.

JOINT DEBTORS.

1. **COVENANT NOT TO SUE ONE OF SEVERAL JOINT DEBTORS** does not discharge the debt as to the others. *Brown v. White*, 226.
2. **ONE JOINT DEBTOR IS NOT DISCHARGED, AT COMMON LAW, BY PART PAYMENT MADE BY OTHER JOINT DEBTOR**, in the absence of any technical difficulties connected with the remedy; such payment having been made, not in satisfaction of the joint debt, but merely for the debtor's own personal discharge therefrom. *Winslow v. Brown*, 638.
3. **NOTE, AND CONTRACT AND PART PAYMENT DISCHARGING ONE OF JOINT PROMISORS**, were made in Massachusetts, by parties there resident: *Held*, in action on the note in Rhode Island, that such contract and payment are to be judged, as to their validity and effect, by the law of the former state, and that the payment operated to discharge only so much of the debt as it paid, and not the part of the joint debtor discharged, as provided by the revised statutes of the latter state, chapter 114. *Id.*

See JUDGMENTS, 2.

JUDGMENTS.

1. **JUDGMENTS ARE PRESUMED TO BE FOUNDED** on proper and sufficient evidence, and they cannot be collaterally impeached, no matter how insufficient the evidence may in fact have been. *Cannon v. Cooper*, 101.
2. **JUDGMENT UNDER JOINT DEBTOR ACTS DOES NOT EXTINGUISH ORIGINAL DEMAND**, when it is in form against two joint debtors, but only one was served with process. *Bonesteel v. Todd*, 90.
3. **PAYMENT BY ONE OF SEVERAL DEFENDANTS OF JUDGMENT**, and the taking of an assignment to such defendants or to a third person, does not operate as a satisfaction of the judgment in favor of the defendants not making.

ing such payment, unless it appears that the payment, when made, was intended to operate as a complete satisfaction of the judgment. *Brown v. White*, 226.

4. JUDGMENT CHARGING MORTGAGE OF CHATTELS AS TRUSTEE, ON HIS DEFAULT, ceases to have any legal effect, where the property is seized and sold on execution, and the proceeds of the sale are applied towards satisfaction thereof. *Brown v. Neale*, 53.
 5. JUDGMENT IS ERRONEOUS when predicated upon the finding of a jury sworn to try "the issues joined between the parties;" but instead of finding upon all the issues, they return a verdict, special in form and referring to but one issue. *Meighan v. Strong*, 441.
 6. HOLDER OF JUDGMENT SHOULD SEE THAT JUDGMENT WAS PROPERLY ENTERED, so as to furnish to the eye of purchasers and subsequent incumbrancers that record notice which the act of assembly contemplates; and being entered in the wrong initial, it is not such notice. *Heil & Lamer's Appeal*, 590.
 7. NUL TIEL RECORD IS INSUFFICIENTLY PLEADED, where the allegation is, in substance, that if there be a record of any such supposed judgment, the defendants were not made parties to the suit in which it was rendered, because it does not conclude with a verification by the record. A demurrer to such a plea ought to be sustained. *Cannon v. Cooper*, 101.
- See ATTORNEY AND CLIENT, 4; ARBITRATION AND AWARD, 1, 2; IDEM SONANS; PARTNERSHIP, 1, 3; PLEADING AND PRACTICE, 13-16; REPLEVIN, 2, 3.

JUDICIAL SALES.

1. ASSISTANT OF OFFICER SELLING PROPERTY to satisfy a writ in his hands is entitled to the same protection as the officer is. *Swires v. Brotherhood*, 601.
2. ONE WHO ACTS SIMPLY AS AUCTIONEER or crier for an officer, and in his presence, at a sale of property under a writ, has a right to bid at the sale, but if the crier was himself conducting the sale, then he would have no such right. *Id.*
3. INADEQUACY OF PRICE IS NOT SUFFICIENT TO IMPEACH PUBLIC SALE which was fairly conducted in every respect. *Id.*
4. WHERE OFFICER TAKES PROPERTY of one of three judgment debtors under a writ and sells it, if he makes a mistake as to the debtor who owns it, the sale will nevertheless be valid if the property is otherwise fully described. *Id.*
5. OFFICER HOLDING WRIT CANNOT ADJUST EQUITIES existing between the parties in interest. If one of them violates his agreement with the other, the latter must take his legal remedy against the former. A writ issued contrary to such an agreement will protect the officer acting under it. *Id.*

JURISDICTION.

1. STATE TRIBUNALS HAVE JURISDICTION to try and determine conflicting claims to lands within its borders, when they arise between citizens of the state, or the state and a citizen, to the same extent that any other question of title or property may be entertained by its courts. And it can make no difference in this respect that both claimants are grantees of the United States. *State v. Bachelder*, 410.
2. ONLY LIMITATIONS UPON STATE IN REGARD TO QUESTIONS cognizable in its courts are such as it may have itself created by the adoption of the

federal constitution. These extend to all cases at law and in equity arising under that instrument, and the laws and treaties of the United States, but it does not follow that the state has relinquished jurisdiction over questions involving private rights, simply because these rights have their origin in some law of the United States. *Id.*

3. **FEDERAL JUDICIARY CAN EXERCISE NO CONTROL WHATEVER** over decisions of state courts, simply because some law, treaty, or authority of the United States is called into question in the state court; but only when the decision of the state court is against the validity of the right, title, or claim set up under such law, treaty, or authority. *Id.*
4. **FEDERAL JUDICIARY HAS NO CONTROL OVER QUESTIONS**, when once the state courts have acquired jurisdiction, until the state has finally exhausted its judicial power over them by a final decision in its highest tribunal. *Id.*
5. **IT IS PECULIARLY QUESTION FOR SUPREME COURT** to determine whether it has jurisdiction to review a decision made in a state court. It is sufficient for the latter to feel assured that it has jurisdiction over the question it is called upon to decide. *Id.*

See **ATTORNEY AND CLIENT**, 5; **LUNATICS**.

JURY AND JURORS.

PERSONS EXEMPTED FROM SERVICE AS JURORS ARE NOT THEREBY DISQUALIFIED TO SERVE ON JURY; and a verdict will not be set aside because a person so exempted was one of the jury. *State v. Forshner*, 132.

See **ADVERSE POSSESSION**, 1, 4; **QUESTIONS OF LAW AND FACT**; **PLEADING AND PRACTICE**, 18.

LACHES.

See **CERTIORARI**, 2; **EQUITY**, 3; **NEGLIGENCE**.

LANDLORD AND TENANT.

1. **GOODS OF TENANT'S WIFE FOUND ON DEMISED PREMISES ARE SUBJECT TO DISTRESS** for rent, although they are her separate property. This rule of law is not altered by the married woman's act of 1848. *Blanche v. Bradford*, 489.

2. **COVENANT IN LEASE, RELATING TO THING NOT IN ESSE**, but to be done upon land, does not run with the land and bind the assignee unless he be named in the covenant. *Emerson v. Simpson*, 184.

See **ESTATES FOR LIFE**; **NUISANCES**, 2, 3. **USE AND OCCUPATION**, 1.

LARCENY.

See **CRIMINAL LAW**, 8, 10.

LEGACIES.

See **CHARITIES**; **CORPORATIONS**, 1; **WILLS**.

LICENSE.

See **DEEDS**, 2.

LIENS.

See **ATTORNEY AND CLIENT**, 3, 4; **EXECUTIONS**, 6; **EXEMPTIONS**, 6; **MORTGAGES' LIENS**; **PARTNERSHIP**, 3.

LIFE ESTATES.

See ESTATES FOR LIFE.

LOST ARTICLES.

See CRIMINAL LAW, 11; SALES, 2.

LUNATICS.

AFTER COURT OF COMPETENT JURISDICTION HAS ACQUIRED JURISDICTION over the estate and person of a lunatic, its judgment or order directing a sale of his real estate cannot be inquired into in a collateral proceeding. If the lunatic dies prior to the entry of such order, it might be reversed in error if the record had been made to show that fact, but it is not *ipso facto* void. *Yaple v. Titus*, 604.

MARRIAGE AND DIVORCE.

1. **RULE THAT FAILURE OF DEFENDANT TO PROVE CHARGE OF PLAINTIFF'S LICENTIOUS CONDUCT**, in action of breach of promise of marriage, in an aggravation of damages, applies as well where such defenses are made orally in court as where the charge is made by plea or by notice, *semble*. *White v. Thomas*, 347.
2. **INSTRUCTION THAT ATTEMPT OF DEFENDANT TO PROVE PREGNANCY AND LICENTIOUS CONDUCT OF PLAINTIFF**, in action for breach of promise of marriage, if he fail altogether in the proof, is to be considered in aggravation of damages, is ground for reversal, if the qualification is not added, "unless the same was made in good faith," or "unless the defendant at the time believed, and had reason to believe, the charge to be true," or words of equivalent import, and if the defendant appears to have been prejudiced by the omission of such qualification, testimony having been introduced which at least tended to show grounds for such belief. *Id.*
3. **DEFENDANT IN ACTION FOR BREACH OF PROMISE IS NOT SUBJECT TO AGGRAVATION OF DAMAGES** because he introduces evidence of the licentious conduct of the plaintiff, which fails to prove it, provided the evidence shows that at the time of the alleged breach he had reasonable ground for believing its truth. *Id.*
4. **CONTRACT, CONSIDERATION OF WHICH IS THAT WIFE WILL NOT APPEAR** in a suit for divorce, nor claim alimony, is void, though made by the husband with a third person, and providing a certain sum for the maintenance of the wife. *Belden v. Munger*, 407.

See WITNESSES, 4.

MARRIED WOMEN.

1. **EQUITY WILL ENFORCE CLAUSE IN PURCHASE-MONEY MORTGAGE, EXECUTED BY MARRIED WOMAN**, without husband joining, stipulating for payment of interest at stated periods, and that in case of default to pay such interest, the whole amount of the mortgage should become due and payable. *Glass v. Warwick*, 566.
2. **MARRIED WOMAN IS NOT ESTOPPED FROM SETTING UP COVERTURE** to an action on her judgment bond, by the fact that she falsely represented herself as single at the time she gave it, and thereby obtained the consideration for which it was given. *Keen v. Coleman*, 524.

See ACKNOWLEDGMENTS, 2, 3, 4; DOWER; GIFTS; HUSBAND AND WIFE; LANDLORD AND TENANT, 1; WILLS, 2, 3, 4.

MASTER AND SERVANT.

1. WHERE ONE OF SEVERAL WORKMEN EMPLOYED IN SAME GENERAL SERVICE IS INJURED through the carelessness of another, the employer is not responsible. *Frazier v. Pennsylvania R. R. Co.*, 467.
2. RAILROAD COMPANY WHICH EMPLOYS CONDUCTOR KNOWN BY IT TO BE UNFIT for the business is chargeable with the consequences of such conductor's carelessness. *Id.*
3. WHERE BRAKEMAN ON RAILROAD KNOWS HIS CONDUCTOR TO BE HABITUALLY CARELESS, and chooses to continue in service with him, and does not inform the company of his known acts of carelessness and refuse to serve with him, he cannot recover against the company for injuries suffered from further carelessness, even though the company also knows it. *Id.*
4. OFFICER OF RAILROAD COMPANY HAVING CHARGE OF DEPARTMENT OF ITS BUSINESS IN WHICH INJURY OCCURS is the person who is expected to use ordinary care in the employment of proper conductors and other servants. His carelessness in that respect is the carelessness of the company, and his knowledge is its knowledge. It is, therefore, error to exclude evidence that such officer did not know that the person through whose improper conduct the alleged injury occurred was a careless conductor. *Id.*

See AGENCY, 3-6; CORPORATIONS, 8.

MAXIMS.

See BONDS, 4.

MECHANICS' LIENS.

1. LIEN FOR WORK AND MATERIALS ON BUILDING is a privilege derived entirely from statutory provision, and cannot be maintained beyond the extent of the grant of the act by which it is conferred. *Rees v. Ledington*, 741.
2. UNDER WISCONSIN STATUTE, LIEN OF MECHANICS AND OTHERS IS SUBORDINATE to that of the vendor of the land on which the building is erected, for unpaid purchase-money. See R. S. Wis., c. 120, secs. 1, 11. *Id.*
3. MECHANIC'S LIEN STATUTE OF WISCONSIN DOES NOT CREATE ANY DISTINCTION BETWEEN EMPLOYER'S OWNERSHIP OF BUILDING and his ownership of the land with which it is connected. The former must follow the latter, unless it has been separated by the agreement of competent parties. *Id.*
4. MECHANIC OR MATERIAL-MAN ACQUIRES LIEN FROM COMMENCEMENT OF BUILDING upon the legal or equitable estate of their employer in the premises; but it is equal only to that of a judgment. It cannot be superior to it. *Id.*
5. MECHANIC'S LIEN.—CONTRACT TO FURNISH MATERIALS AND PERFORM WORK in the construction of a building is an entirety, and no part of the work is regarded as being done, or material as being furnished, until the whole contract is complete. *Derrickson v. Edwards*, 220.
6. MECHANIC'S LIEN.—PURCHASER OF PROPERTY AFTER WORK HAS BEGUN on a building is properly named as an owner in a claim for a lien subsequently filed, and is a proper and necessary party in a proceeding to foreclose such lien. *Id.*

7. **TRAMSTER HAS LIEN FOR HAULING LUMBER USED IN ERECTION OF BUILDING**, under the mechanic's lien law of Pennsylvania, and it is error to strike such lien off the record. *Hill v. Newman*, 473.
8. **COST OF FLUME IS PROPERLY INCLUDED IN MECHANIC'S LIEN**, where such flume is used for the purpose of conveying water to a wheel within the mill-building, and is necessary as a fixed contrivance for the operation of such mill. *Derrickson v. Edwards*, 220.
9. **WORD "FLUME" MEANS** passage or channel for the water that turns a mill-wheel. *Id.*
10. **CLAIMING IN MECHANIC'S LIEN MORE LAND** than is necessary for the convenient and beneficial enjoyment of the building upon which the work was done or material furnished does not vitiate the whole claim. The amount of land necessary in such case is a question of fact to be settled in some manner at the trial. Although a lien cannot be extended beyond the land described in the lien claim, it does not follow that the claimant must show himself entitled to a lien on all the land so described or else lose his entire claim. *Id.*
11. **CLAIM OF MECHANIC'S LIEN IS NOT VOID** because it does not accurately describe the size of the building against which it is filed. If there is enough in the description of the locality and peculiarities of the building to point it out with reasonable certainty, this is sufficient. *Kennedy v. House*, 594.
12. **IDENTITY OF BUILDING WHICH IS ATTEMPTED TO BE DESCRIBED IN CLAIM** for a mechanic's lien is to be left to the jury, under a statute which provides that the claim filed shall set forth "the locality of the building, and the size and number of the stories of the same, or such other matters of description as shall be sufficient to identify the same. *Id.*

MINES AND MINING.

1. **TROVER IS PROPER REMEDY FOR TRESPASS** committed by mining coal and carrying it away from another's land by mistake. *Forsyth v. Wells*, 617.
2. **MEASURE OF DAMAGES FOR MINING COAL ON ANOTHER'S LAND** by mistake, and carrying it away, is the fair value of the coal in its place before being mined, and such injury to the land as the mining may have caused. *Id.*

MISTAKE.

1. **EQUITY WILL RELIEVE FROM MISTAKE** without prejudice to sales made under other judgments, where a sheriff, intending to sell property attached, advertises and sells land under an erroneous description, and not belonging to the judgment debtor, to the judgment creditor, who is also ignorant of the mistake, and supposed that he was purchasing, and intended to purchase, only the land attached. *Lay v. Shambles*, 446.
 2. **INNOCENT PARTIES CANNOT BE RELIEVED AGAINST MUTUAL IGNORANCE AND MISTAKE OF LAW** if there is no element of fraud or bad faith introduced or relied upon. *Town of Rochester v. Alfred Bank*, 746.
- See BANKS AND BANKING, 3; EQUITY; MINES AND MINING, 1, 2; PLEADING AND PRACTICE, 1.**

MORTGAGES.

1. **TRANSACTION IS MORTGAGE** where a deed is made of certain premises, but the grantor remains in possession, and prior to the execution and delivery

of the deed the grantee indorses upon its back an agreement to reconvey, at the expiration of a specified time, in payment of a sum of money, nearly equal to the consideration of the deed, and less than the value of the premises, together with a sum for the use of the premises. *Graham v. Stevens*, 675.

2. INSTRUMENT MAY BE REGARDED AS MORTGAGE, ALTHOUGH NO OTHER WRITTEN EVIDENCE OF DEBT EXISTS than that furnished by the instrument itself. *Id.*
3. MORTGAGEE MAY DIRECTLY ENFORCE, BY PERSONAL ACTION, LIABILITY OF GRANTOR OF MORTGAGED PREMISES, who has assumed payment of mortgage, without foreclosing the mortgage, and without impleading the original obligor and mortgagor. *Burr v. Beers*, 327.
4. FIRST MORTGAGEE IS NOT NECESSARY PARTY DEFENDANT TO FORECLOSURE OF SECOND MORTGAGE; and if made a party without any allegation in the complaint contesting his title, he has a right to assume that the proceeding is to be conducted upon the theory that his lien is paramount to that of the plaintiff. *Strobe v. Downer*, 709.
5. THOSE CLAIMING TITLE ADVERSELY TO MORTGAGOR, OR PRIOR TO MORTGAGE WHICH IS FORECLOSED, even though made parties, are not divested of such adverse or prior rights, by the ordinary clause in foreclosure judgments, barring the defendants and those claiming under them of all right and equity of redemption in the premises. But this clause is held to relate only to such interests as are claimed subsequent and subject to the mortgage which is being foreclosed. *Id.*
6. RIGHTS OF FIRST MORTGAGEE, AND OF HIS ASSIGNEE, AT FORECLOSURE SALE UNDER SECOND MORTGAGE.—The second mortgagee foreclosed making the first mortgagee a defendant under the general allegation only "that he had or claimed some interest in the mortgaged premises." Judgment was rendered containing the usual clause barring the defendants of all their rights, etc. The second mortgagee bought the mortgaged premises at the foreclosure sale, and received the sheriff's deed therefor. The first mortgagee, prior to the bringing of the foreclosure suit, had assigned his mortgage, but the assignment was never recorded, and the second mortgagee had no notice of it at the time of the foreclosure sale, but he did have notice, both actual and constructive, that the first mortgage existed, and was notified by the mortgagor himself that it had not been paid. *Held*, that the rights of the first mortgagee, had he continued to hold his mortgage, would not have been cut off by the foreclosure and sale, and that consequently the rights of his assignee were not thereby cut off. *Id.*
7. DECREE OF FORECLOSURE OF MORTGAGE OF WHICH ONE INSTALLMENT ONLY IS DUE, containing a clause allowing the plaintiff to apply for a further order of sale upon a subsequent installment falling due, and for an execution for any deficiency that might remain, where the entire premises were sold and did not bring enough to pay the first installment for which the decree was rendered, is not a bar to a personal action against the mortgagor for a subsequent installment when it becomes due. *Bliss v. Weil*, 766.
8. NOTE NOT DUE WHEN MORTGAGE BY WHICH IT IS SECURED IS FORECLOSED is not merged in the decree, and the decree is not a bar to a personal action on the note brought against the mortgagor. *Id.*
9. WHERE MORTGAGED PREMISES ARE ALL SOLD TO SATISFY FIRST INSTALLMENT due upon the mortgage, the court cannot enter up a personal judgment.

- ment against the mortgagor, for a subsequent installment when it becomes due. *Id.*
10. WHERE PROPERTY COVERED BY CHATTEL MORTGAGE, PROPERLY FILED, IS SO TAKEN AND CONVERTED within the year after the filing as to give the mortgagee a good cause of action for such taking, it is unnecessary for the preservation of his right to recover, that he should commence his action within the year from such filing, or that the mortgage should be renewed at the end of the year by affidavit, as required by statute in order to make it valid against subsequent purchasers or mortgagees. *Case v. Jewett*, 752.
 11. WHERE CHATTEL MORTGAGEES EMPLOY THEIR MORTGAGOR TO FILE THEIR MORTGAGE, and he, at the time of filing it, for his own purposes and without their knowledge, requests the clerk "to place it at the bottom of the pile, so that nobody would see it," and says that he does not want anybody to know that he has given it, such request is not within the scope of his agency for the mortgagees, and does not prejudice their rights. *Id.*
 12. CONFLICTING CASES AS TO EFFECT OF STIPULATION IN MORTGAGE PERMITTING MORTGAGOR TO RETAIN POSSESSION, etc.: 1. A stipulation in a mortgage permitting the mortgagor to retain possession of a stock of goods, and to make purchases from time to time, and to sell off in the ordinary manner, is only *prima facie* evidence of fraud, and may be rebutted by circumstances showing that the transaction was fair and honest; 2. Such a provision in a chattel mortgage of a stock of goods vitiates the instrument, and renders it void in law; 3. Such provisions in assignments for the benefit of creditors have generally been held to render such assignments void as to creditors. *Place v. Langworthy*, 758.
 13. MORTGAGE OF STOCK OF GOODS, AUTHORIZING MORTGAGOR TO RETAIN POSSESSION of the property, and to dispose of it in the ordinary and regular course of retail trade, "paying out of the proceeds of the sales all necessary store and business expenses, together with all expenses for the support of the mortgagor and his family for an indefinite period," so long as he shall deposit the excess to the credit of the mortgagee, is, upon its face, fraudulent in law, and void as to creditors. *Id.*
 14. DESCRIPTION OF PROPERTY IN CHATTEL MORTGAGE IS SUFFICIENT, as between the parties, where reference is made to a schedule attached to another mortgage, of a date mentioned, made by the same mortgagor to another person. *Newman v. Tymeson*, 735.
 15. STRANGERS ARE CHARGED WITH NOTICE OF MORTGAGE REFERRING TO SCHEDULE ATTACHED TO ANOTHER MORTGAGE, when it is filed in the proper office, if the mortgage and schedule referred to are also in the same office, open to inspection, and contain a sufficient description of the property conveyed. *Id.*
 16. SECOND MORTGAGE, REFERRING TO FIRST MORTGAGE AND SCHEDULE FOR DESCRIPTION, NEED NOT STATE that the mortgage whose schedule is thus referred to is on file. *Id.*
 17. SECOND MORTGAGEE, WHOSE MORTGAGE DECLARES THAT HE MAY AT ANY TIME TAKE POSSESSION, is entitled to the possession of the property as against all the world, except the first mortgagee whose debt is unpaid; and can maintain an action for any taking of it which was not in pursuance of the first mortgage, and therefore in defiance of his own right. *Id.*
 18. INTERESTS OF FIRST AND SECOND MORTGAGEES ARE DISTINCT, and they must sue separately for injuries to their several interests. *Id.*

See ACKNOWLEDGMENTS, 3, 4; ATTORNEY AND CLIENT, 4; EXECUTIONS, 9; EXPECTANCY, 3; HOMESTEADS, 3; HUSBAND AND WIFE, 13, 14; JUDGMENTS, 4; MARRIED WOMEN, 1; PARTNERSHIP, 15; REGISTRATION; VENDOR AND VENDEE.

MUNICIPAL CORPORATIONS.

See AGENCY, 5, 6; BONDS; CORPORATIONS.

MURDER.

See CRIMINAL LAW, 6.

NAMES.

See IDEM SONANS; JUDGMENTS, 6; TRADE-MARKS.

NECESSARIES.

See HUSBAND AND WIFE, 1-5.

NEGLIGENCE.

1. QUESTION OF NEGLIGENCE OUGHT, GENERALLY, TO BE SUBMITTED FOR DETERMINATION OF JURY. *McCully v. Clarke*, 584.
 2. WHERE DUTY IS DEFINED, FAILURE TO PERFORM IT IS OF COURSE NEGLIGENCE, and may be so declared by the court. *Id.*
 3. JURY ALONE CAN DETERMINE WHAT IS NEGLIGENCE, AND WHETHER PROVED, where the measure of duty is varying, where a higher degree of care is demanded under some circumstances than others, and where both the duty and the extent of performance are to be ascertained as facts. *Id.*
 4. BURDEN OF PROOF IS UPON PLAINTIFF IN ACTIONS FOR NEGLIGENCE; the law will not presume it for him. *Id.*
 5. PLAINTIFF IN ACTION FOR NEGLIGENCE IS NOT ENTITLED TO RECOVER, if the loss resulted from mutual negligence; and this is a question for the jury. *Id.*
 6. WHERE SUBJECT OF INQUIRY IS, WHETHER DEFENDANT HAD USED SUCH DILIGENCE AS PRUDENT AND REASONABLE MEN WOULD HAVE EXERCISED, the court may properly refuse to instruct the jury, that if they believed certain facts to be proved, of which evidence had been given, the defendant was guilty of negligence as matter of law, and that the plaintiff was entitled to recover. *Id.*
 7. DUE CARE AND REASONABLE DILIGENCE ARE NOTHING LESS THAN MOST WATCHFUL CARE AND ACTIVE DILIGENCE in any business involving the personal safety and lives of others. *Hadley v. Cross*, 699.
 8. LIVERY-STABLE KEEPER IS ANSWERABLE TO HIRER FOR INJURY WHICH HAPPENS BY REASON OF DEFECT IN VEHICLE HIRED, which might have been discovered by the most careful and thorough examination; but not for an injury which happens by reason of a hidden defect, which could not, upon such examination, have been discovered. *Id.*
- See AGENCY, 3-6; BAILMENTS, 5; COMMON CARRIERS, 5, 7, 9, 10; MASTER AND SERVANT, 1-4; PHYSICIANS, 12; SET-OFF.**

NEGOTIABLE INSTRUMENTS.

1. INSTRUMENT IS PROMISSORY NOTE, when its makers promise to pay to the order of certain persons, at a time and place named, a sum of money, "with current exchange on New York." *Smith v. Kendall*, 82.

2. **INDORSEER OF PROMISSORY NOTE MAY DECLARE THEREON AS ASSIGNEE.** *Id.*
3. **ONE WHO SIGNS INSTRUMENT IN PLACE FOR SUBSCRIBING WITNESS IS NOT PRIMA FACIE LIABLE** as a co-promisor, because the word "witness" did not appear, where the instrument is in form the single bill of another, and is executed by him as such. *Steininger v. Hoch*, 521.
4. **PROMISSORY NOTE GIVEN IN CONSIDERATION OF MONEY ADVANCED AT REQUEST OF MAKER TO BROKER, for losses sustained in stock-jobbing transactions, in violation of statute, is valid.** *Wyman v. Fiske*, 66.
5. **BURDEN OF PROOF IS ON MAKER OF PROMISSORY NOTE TO ESTABLISH ILLEGALITY OF CONSIDERATION, if he resists payment on that ground.** *Id.*
6. **BURDEN OF PROOF, IN ACTION BY INDORSEER OF NEGOTIABLE NOTE AGAINST MAKER, who pleads that there was no consideration for the note, and that the payee fraudulently transferred it, and that the plaintiff had knowledge of the fraud when he took the note, and who proves the want of consideration and the fraudulency of the transfer as against himself, is upon the plaintiff to show that he received the note before due for a valuable consideration, whereupon the burden shifts back to the defendant to show the plaintiff's knowledge of the want of consideration and fraud; and it is not incumbent upon the plaintiff to prove his ignorance of these facts, in order to entitle him to recover.** *Davis v. Bartlett*, 375.
7. **INDORSEER MUST PROVE THAT HE RECEIVED NOTE IN USUAL COURSE OF BUSINESS, as well as for value, and before due, after the defendant has proved that it was fraudulently diverted or fraudulently put in circulation by the plaintiff's indorser, *semble*.** *Id.*
8. **INDORSEER OF MERCANTILE PAPER IS PRESUMED TO BE BONA FIDE HOLDER, and entitled to the payment thereof.** *Id.*
9. **VENDER MAY RECOVER BACK MONEY PAID TO BROKER FOR FORGED NOTE, sold by the broker without disclosing the name of his principal, although the broker has paid over the money to his principal, there having been no unreasonable delay in giving notice of the forgery after discovery, and although the note was sold for a sum less than its face.** *Merriman v. Wolcott*, 69.
10. **PROMISSORY NOTE GIVEN FOR PRECEDENT DEBT IS NOT PAYMENT OF IT, but is a mere security. The note is simply evidence of the debt.** *Weymouth v. Sanborn*, 144.
11. **INDORSED PROMISSORY NOTE PAYABLE ON DEMAND, with interest, is a continuing security, on which the indorser will remain liable until an actual demand; and upon which the holder is not chargeable with neglect for omitting to make demand within any particular time.** *Merritt v. Todd*, 243.
12. **ACCOMMODATION INDORSEER OF NOTE OR BILL IS LIABLE THEREON to subsequent indorsee who receives it for value and in the ordinary course of business.** *Struthers v. Kendall*, 610.
13. **INDORSEER OF BILL WHO RECEIVES IT BEFORE MATURITY IN CONSIDERATION OF ANTECEDENT INDEBTEDNESS of his indorser, and gives him credit on his books for the amount of the note, is entitled to recover in an action against a prior indorser, notwithstanding the equities which might have existed between the original parties, such credit being a sufficient consideration in law to constitute him an indorsee for value.** *Id.*
14. **ALTERATION OF BILL OF EXCHANGE BY NOTING RESIDENCES OF INDORSEERS thereon, after their names, is not material so as to affect in any way either its identity or validity.** *Id.*

15. **INDORSER OF PROMISSORY NOTE MAY**, at any time after it becomes due, pay the amount to the legal holder, and at once proceed to enforce it against the maker; or in case several judgments have been obtained upon such instrument, against him and the maker, may pay the judgment against himself, take an assignment of that against the maker, and enforce it in his own behalf. The Minnesota statute does not change this rule. *Folsom v. Carl*, 429.
 16. **WHERE BILL IS ADDRESSED TO DRAWEE AT PARTICULAR HOUSE**, and is accepted generally by him, the address indicates the place where it is to be presented for payment, and a presentment at such place will be sufficient as against the drawee and indorsers. *Id.*
 17. **PAYMENT BY ACCEPTOR OF BILL OF EXCHANGE EXTINGUISHES DEBT**, and no right of action remains against drawer or indorser unless the acceptance was *supra protest*. *Swope v. Ross*, 567.
 18. **ACCEPTANCE IS ENGAGEMENT TO PAY BILL ACCORDING TO TENOR AND EFFECT AT MATURITY**, and not before. And a bill is "paid" only when it is done in due course, and with an intention to satisfy and discharge it. *Id.*
 19. **DRAWER OF BILL MAY ACCEPT OR PAY IT UNDER PROTEST, FOR HONOR OF DRAWER OR INDORSER**, but if he discounts it before maturity, he occupies the position of an indorsee for value, as against all prior parties. *Id.*
 20. **INDORSER OF NOTE MAY BE CHARGED, BY NOTICE OF NON-PAYMENT, WITHOUT PRESENTMENT**, where the maker of the note removes from the state before maturity of the note, and continues to reside abroad until after its maturity. *Foster v. Julien*, 320.
 21. **TESTIMONY OF NOTARY IS ADMISSIBLE TO PROVE DEMAND OF PAYMENT, protest, and notice thereof to defendant**. *Struthers v. Kendall*, 610.
- See **BANKS AND BANKING**, 3; **COLLATERAL SECURITIES**; **HOMESTEADS**, 3; **PARTNERSHIP**, 14; **SALES**, 17; **USE AND OCCUPATION**, 2.

NOTARIES.

See **NEGOTIABLE INSTRUMENTS**, 21.

NOTICE.

See **INSURANCE**, 5, 7, 8, 10, 12, 13; **NEGOTIABLE INSTRUMENTS**, 20, 21; **MORTGAGES**, 15; **PLEDGE**; **REGISTRATION**.

NONSUIT.

See **PLEADING AND PRACTICE**, 5.

NUISANCE.

1. **DESTRUCTIVE NUISANCE MAY BE ENJOINED**, although it is also the subject of ordinary legal redress; nor is a bill to enjoin such nuisance demurrable because it does not state that the rights of the parties have been settled by a judgment at law. *Aldrich v. Howard*, 636.
2. **TENANT FOR YEARS IS LIABLE FOR RESTORING BUILDING, CONSTITUTING NUISANCE**, which was erected by his lessors, before the commencement of the tenancy, and abated afterwards; but he is not liable for merely refitting the building after it was injured. *McDonough v. Gilman*, 72.
3. **TENANT FOR YEARS IS NOT LIABLE FOR CONTINUING NUISANCE** existing at the commencement of his tenancy, unless he is requested by some unequivocal language to remove it. *Id.*

See **EQUITY**, 4.

OFFICE AND OFFICERS.

1. **PUBLIC OFFICER IS RESPONSIBLE FOR ACTS OF MISFEASANCE**, where his services are voluntary and attended with compensation, and his duty is entire, absolute, perfect, and personal, and not only one which he is under obligation, but clothed with ability, to perform, both in the means furnished him, and the legal authority to act, irrespective of superior officers. *Nowell v. Wright*, 62.
2. **TENDER OF DRAW-BRIDGE IS LIABLE FOR INJURIES CAUSED BY IMPROPER DISCHARGE OF HIS DUTIES**, where, although he is appointed by the state, he has a salary, and has the exclusive management and direction as to the proper opening of the draw, and all precautionary measures in relation thereto. *Id.*
3. **BUSINESS OF DEPUTY IS TO PERFORM DUTIES OF PRINCIPAL**; and a deputy clerk may authenticate instruments for record when his principal is authorized so to do. *Rose v. Newman*, 646.
4. **OBLIGATION OF OFFICIAL BOND ONLY EXTENDS FOR PERIOD NAMED IN CONDITION**, or for the term fixed by law, and does not cover any extension of the time by a future appointment, or subsequent election, although the language of the condition as to time is general and unlimited, where the appointment is for a limited period, which is recited in the condition, or is fixed and determined by law, when not so recited. *Treasurer of Vermont v. Mann*, 688.
5. **OFFICIAL BOND DOES NOT COVER DEFAULTS OCCURRING AFTER EXPIRATION OF TERM OF OFFICE** under the first election, where it was given by a person on his election as director of a bank, conditioned for the due performance of his duties as director "while he shall be a director of said bank," and he was annually re-elected for several years afterwards, but never gave any other bond. *Id.*
6. **OFFICE OF BANK DIRECTORS IS ANNUAL ONE**, where they are required to be elected annually, although it is provided that they shall hold office until others are elected and qualified, and they are forbidden to enter upon the duties of their office until their bonds have been executed and approved. *Id.*

See **ARREST**; **JUDICIAL SALES**, 1, 2; **PUBLIC LANDS**, 5, 6; **SHERIFFS**; **SURETYSHIP**, 3.

PARENT AND CHILD.

See **ADVANCEMENTS**.

PARTIES.

See **EXECUTORS AND ADMINISTRATORS**.

PARTNERSHIP.

1. **PARTNERSHIP RELATION EXISTS, ALTHOUGH CONDITIONS OF PARTNERSHIP ARE NOT UNDERSTOOD ALIKE BY PARTNERS**, when persons agree to become partners, and actually proceed to carry into execution the joint undertaking or business. *Cook v. Carpenter*, 670.
2. **INTEREST OF PARTNER IN PARTNERSHIP EFFECTS** is a share in the surplus remaining of the partnership property after paying off the debts of the firm. *Arnold v. Wainwright*, 448.
3. **EACH PARTNER HAS LIEN UPON PARTNERSHIP PROPERTY**, to the end that he may insist that it be first applied to the payment of the firm

- debts. This interest of the individual partner in the firm assets is assignable, and may be taken in execution. *Id.*
6. **IN EQUITY, LAND BELONGING TO PARTNERSHIP** is treated as mere personality, and is governed by the rules applicable to that species of property. *Id.*
 6. **WHETHER LAND IS TO BE DEEMED PART OF PARTNERSHIP STOCK** depends upon the agreement of the partners, which agreement may be either express or implied. *Id.*
 6. **LANDS MAY BE CONVERTED INTO PARTNERSHIP STOCK** by parol agreement of the partners, or by such facts and circumstances attending its acquisition or use as will raise an implication that the partners so intended. The legal estate will be controlled by the terms of the conveyance, but equity will subject the lands to the same liabilities imposed upon the other partnership estate, and restrict the partners to the same extent in their disposition of them as obtains in regard to personality. *Id.*
 7. **IF LAND IS ACQUIRED AS SUBSTRATUM OF PARTNERSHIP**, or is brought in and used by it for partnership purposes, there will be a trust by operation of law for the partners as tenants in common, although a trust may not have been declared in writing, and the ownership may not be apparently in all the members of the firm, or if in all, may apparently be in them, not as partners, but as joint tenants. *Id.*
 8. **EACH PARTNER IS ENTITLED TO REGARD** entire partnership estate as held for his indemnity as against the joint debts, and as security for the ultimate balance which may be due him for his own share of the partnership effects. *Id.*
 9. **RULE THAT EQUITY REGARDS LAND HELD BY PARTNERSHIP** as personal estate prevails, notwithstanding the legal title may, by the death of the party holding it, have been cast by descent upon his heirs at law, or that the estate may have been conveyed to the partnership by such deed as would, under the statute, make them tenants in common; nor does it make any difference that the deed makes no reference upon its face to the grantees as partners. *Id.*
 10. **LAND PURCHASED WITH PARTNERSHIP FUNDS**, to be used and applied to partnership purposes, and treated by the partners as part of the partnership stock, will be treated in equity as held in trust for the partnership until the partnership account is settled and the firm debts are paid. *Id.*
 11. **UNDER MINNESOTA STATUTE, TRUST ARISES** in favor of a partnership when lands are conveyed to the individual members of the firm as tenants in common, or otherwise than as partners; nor does the recognition and enforcement of such trust conflict with the statute of frauds. *Id.*
 12. **UNDER MINNESOTA STATUTE, IF CONVEYANCE OF LAND TO PARTNERS** makes no reference to the land as partnership stock, but vests the title in several of the members as tenants in common, then the trust which arises between the partners cannot be enforced against a *bona fide* purchaser or mortgagee without notice, but will be enforced against a purchaser or mortgagee from one partner, or his representative, who has notice, actual or constructive, that the land is partnership property. *Id.*
 12. **LAND PURCHASED AND HELD FOR PARTNERSHIP PURPOSES IS PARTNERSHIP PROPERTY**, although not necessary for the purposes of the firm; and judgments against the firm for partnership debts are payable out of its proceeds, in preference to judgments against the partners for individual debts. *Erwin's Appeal*, 542.

14. **NOTE MADE UNDER FOLLOWING CIRCUMSTANCES** was held to be the property of the firm, and not chargeable to the individual member who signed it, viz.: G. B. McFarland, the testator of defendant in error, and Brown, the plaintiff in error, were partners in a store under the firm name of McFarland & Co., and they were partners with one Caldwell in a smelting furnace, under the name of Phoenix Furnace. The latter firm owed the former firm one thousand two hundred dollars, which was represented by an individual note of McFarland, drawn in favor of Brown. Brown claimed a right to charge the whole of this note against McFarland's estate, but the claim was disallowed. *Brown v. McFarland*, 598.
15. **MORTGAGE GIVEN TO THREE PARTNERS TO SECURE PAYMENT OF DEBT DUE FIRM** may be transferred by an assignment of such debt, executed by one of the partners in the name of the firm. And the fact that a seal is appended to the name of the firm does not invalidate the assignment. *Dubois's Appeal*, 478.
16. **ONE PARTNER MAY, BY VIRTUE OF PAROL AUTHORITY FROM HIS COPARTNERS**, bind them by an instrument under seal, although as a general rule an authority to bind another by an instrument under seal must itself be created by a like instrument. *Wilson v. Hunter*, 795.
17. **WHERE ONE OF THREE PARTNERS EXECUTES, IN FIRM NAME, WITH CONSENT OF HIS COPARTNERS**, mortgage on land owned by one of the other partners, for the purpose of securing a partnership debt, such mortgage will be valid as against a party who, with actual notice thereof, takes a subsequent mortgage of the same property from the partner in whose name the title stands. *Id.*
18. **SURVIVING PARTNERS ARE ENTITLED TO CLOSE UP PARTNERSHIP BUSINESS** after the death of a member of the firm, but are not entitled to charge for their services in so doing. *Brown v. McFarland*, 598.
19. **EXECUTOR OF DECEASED PARTNER CANNOT EMPLOY SURVIVING PARTNER** to wind up the affairs of the firm at a fixed compensation, unless he is expressly authorized to do so by his testator's will. *Id.*
20. **INTEREST OF PARTNER IN TANGIBLE PROPERTY OF FIRM IS LIABLE TO SEIZURE UPON EXECUTION** in favor of his separate creditor. *Nixon v. Nash*, 390.
21. **LEVY AND SALE ON EXECUTION OF PARTNERSHIP PROPERTY FOR INDIVIDUAL DEBT OF ONE PARTNER** must be of an undivided interest in the chattel corresponding to the debtor's share in the firm; but the purchaser at the sale acquires only the beneficial interest of the debtor partner therein. *Id.*
22. **EACH PARTNER HOLDS HIS INTEREST IN JOINT PROPERTY SUBJECT TO TRUST** for the partnership creditors and the claims of his several copartners, so that the beneficial interest of each is his residuary share after the partnership accounts are settled, and their rights *inter sese* adjusted. *Id.*
23. **SEPARATE CREDITOR OF PARTNER WHO HAS LEVIED EXECUTION ON TANGIBLE PROPERTY OF PARTNERSHIP** may file a petition in equity against the other partners, before a sale upon execution for an account of the partnership, and the ascertainment of his debtor's interest in the property seized. *Id.*
24. **UPON LEVY OF EXECUTION BY CREDITOR OF INDIVIDUAL PARTNER** upon tangible property of firm, it is the right of the creditor and of the other copartners, should either desire, to invoke the equity powers of the court to adjust the partnership business, and to stay proceedings under the

execution, till the beneficial interest of the debtor partner in the goods seized has been ascertained; but if they do not so elect, the officer must sell the apparent interest of the debtor in the chattels levied on, and upon such sale redeliver the same to the other partners and the purchaser, who will then be owners in common, subject to a lien in favor of the other partners and the joint creditors, upon the interest of the debtor partner in the hands of the purchaser, for any balance due upon final adjustment of the partnership account. *Id.*

25. EQUITY OF PARTNERSHIP CREDITORS TO HAVE PARTNERSHIP PROPERTY APPLIED TO FIRM DEBTS is to be worked out through the partners. *Backus v. Murphy*, 531.

26. PARTNER MAY APPLY OR COMPEL APPLICATION OF PARTNERSHIP PROPERTY TO FIRM DEBTS while any partnership property remains; and, it would seem, if he is backward, firm creditors may compel him to allow them to use his name for this purpose. *Id.*

27. EQUITY OF PARTNERSHIP CREDITORS TO HAVE PARTNERSHIP PROPERTY APPLIED TO FIRM DEBTS IS EXTINGUISHED by a sale of the property on execution against an individual partner, the effect of which is to exhaust the firm assets and dissolve the partnership. *Id.*

PARTITION.

1. PLEA THAT PREMISES ARE NOT PARTIBLE IS NO SUFFICIENT DEFENSE TO PETITION FOR PARTITION, which prays not only for partition, but that if the premises are not partible, that they may be assigned or sold pursuant to statute. *Baldwin v. Aldrich*, 695.

2. ASSIGNMENT OR SALE OF PREMISES OWNED IN COMMON WILL NOT BE REFUSED when they cannot be partitioned without great inconvenience to the parties interested, because the petitioner has not been hindered in the enjoyment of his share. *Id.*

3. PARTITION, ASSIGNMENT, OR SALE MAY BE MADE OF THAT PART OF PREMISES OWNED IN COMMON, in Vermont, where upon the trial of a petition for partition, it appears that the parties are tenants in common of only a part of the premises described in the petition. *Id.*

4. PARTITION WILL NOT BE MADE OF REVERSIONARY INTEREST IN LAND covered by a license held by one of the tenants in common. *Id.*

5. SALE OF DECEASED PERSON'S ESTATE, TO CARRY OUT PARTITION THEREOF, must be made by the administrator, and if made by a commissioner appointed by the county court for the purpose, conveys no title. *Ross v. Newman*, 646.

6. IF SALE OF LANDS FOR PARTITION AMONG HEIRS BECOMES NECESSARY, and there be no administrator, there can be no sale until one is appointed. The estate is vested in the heirs, subject only to such disposition of it as may be necessary to be made by the administrator, under the orders of the court, to pay debts, make partition, and the like.

PATENTS.

See PUBLIC LANDS, 2-7.

PERJURY.

See CRIMINAL LAW, 12; WITNESSES, 4.

PEWS.

See SUBSCRIPTIONS, 5.

PHYSICIANS.

1. **SURGEON IS ANSWERABLE TO HIS PATIENT FOR ERROR OF JUDGMENT** so gross as to be inconsistent with the use of that degree of skill that it is the duty of every surgeon to bring to the treatment of a case. *West v. Martin*, 107.
2. **NEGLIGENT OR IMPROPER CONDUCT OF PATIENT** will not defeat his right of recovery against his physician for malpractice, unless it substantially contributes to the injury for which the patient seeks to recover. *Id.*

See HOMESTEADS, 2.

PLEADING AND PRACTICE.

1. **IN PLEADING FRAUD, ACCIDENT, OR MISTAKE**, the facts and circumstances must be alleged. *Fahie v. Pressey*, 401.
2. **DECLARATION MAY BE AMENDED** where the court can see that the identity of the cause of action is preserved. *Haverhill Ins. Co. v. Prescott*, 123.
3. **THERE IS POWER TO AMEND ON REVIEW.** *Id.*
4. **OBJECTION TO ANSWER FOR WANT OF VERIFICATION** is waived by receiving and retaining that pleading without objection. *Folsom v. Carli*, 429.
5. **MOTION FOR NONSUIT WILL NOT BE GRANTED** if there is any competent evidence tending to prove the fact in issue. *Page v. Parker*, 172.
6. **MANIFEST DISTINCTION EXISTS BETWEEN FAILURE TO CHARGE AND GIVING CHARGE CALCULATED TO MISLEAD**, and though the failure to state a qualification of a general rule given to a jury may not of itself justify a reversal, unless the court, upon request, should refuse to give it, still if it is manifest that the jury erred for want of such instruction, the judgment will be reversed. *White v. Thomas*, 347.
7. **INSTRUCTION MUST BE APPLICABLE TO TESTIMONY**, and where there is testimony tending to bring the case fairly within an exception to a general rule, an instruction will be misleading which states the general rule as applicable to the testimony without stating it to be merely a general rule, and subject to exceptions, and without adverting to such testimony. *Id.*
8. **WHERE, FROM WHOLE RECORD, IT APPEARS THAT JURY WERE MISLED BY INSTRUCTION**, the judgment will be reversed, though the instruction is correct as an abstract proposition of law. *Id.*
9. **INSTRUCTION IS NOT ERRONEOUS, WHERE THERE IS ANY EVIDENCE TENDING TO PROVE FACTS** upon which it is based, and it correctly states the law applicable to such evidence. *Breese v. State*, 340.
10. **VERDICT MUST BE CLEARLY CONTRARY TO EVIDENCE** to justify reversal of judgment on that ground. *Id.*
11. **VERDICT, WHICH FROM WHOLE RECORD APPEARS TO BE RIGHT**, will not be disturbed in the appellate court, though it be contrary to the charge of the court below. *Pearson v. Burditt*, 649.
12. **IT IS COUNSEL'S DUTY TO SEE THAT VERDICT IS SIGNED**, and that it is for no more than was ordered. *Frink v. Frink*, 189.
13. **NOTICE OF MOTION TO VACATE JUDGMENT** rendered at former term must be given to the adverse party. *Hettrick v. Wilson*, 337.
14. **ORDER VACATING JUDGMENT ON PLAINTIFF'S MOTION WILL BE REVERSED ON ERROR** where there is no finding by the court that the plaintiff had a valid cause of action, and the statute provides that "a judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense in the action in which the judgment is rendered; or if the plaintiff seeks its vacation, that there is a valid cause of action." *Id.*

15. NO PRESUMPTION THAT APPELLANT RECEIVED NOTICE OF MOTION TO VACATE JUDGMENT arises, upon appeal from an order vacating a judgment, from the fact that the record is silent upon the subject. *Id.*
 16. APPEAL, AFTER JUDGMENT ON MERITS, DOES NOT OPEN QUESTION of the propriety of an amendment, or of the decision upon a motion to quash the writ. *Parker v. Barker*, 130.
 17. RECORD SHOULD SHOW BILL OF EXCEPTIONS SEALED TO DECISION OF COURT BELOW, otherwise the objection will be regarded as waived. *Graham v. McCreary*, 591.
 18. WHERE TRIAL IS BY JURY, APPELLATE COURT IN NEW YORK has no power to review questions of fact determined in the lower court; and hence on an appeal from an order granting a new trial, the order will be affirmed, if it can stand consistently with any view taken of the evidence given at the trial. *Sanford v. Eighth Avenue R. R. Co.*, 286.
- See ACCORD AND SATISFACTION, 1; ASSUMPSIT; ATTACHMENTS; CERTIORARI; EQUITY, 4; EXECUTORS AND ADMINISTRATORS, 3-5, 7; JUDGMENTS, 7; REFERRES; REPLEVIN; TROVER.

PLEDGE.

PLEDGER IS BOUND TO NOTIFY PLEDGOR OF INTENT TO SELL PLEDGE, after default in payment, and of the time and place of sale, in the absence of a contract to sell *ex mero motu*. *Davis v. Funk*, 519.

See POWERS.

POWERS.

WHERE OWNER OF STOCK EXECUTES AND DELIVERS POWER OF ATTORNEY authorizing the person named therein as attorney to transfer the stock to a person the place for whose name is left blank, with the understanding that it is to be pledged as collateral security to a particular creditor of the person for whose benefit the power of attorney was executed, and the name of such creditor is afterwards inserted in the blank, the authority of the attorney is exhausted by thus inserting the name of the creditor whose debt was to be secured by the transfer; and when that debt is paid, the owner of the stock is entitled to its return, notwithstanding the fact that the attorney may have transferred it as security for other debts, by erasing the name first inserted and inserting another in the blank originally left therein. *Denny v. Lyon*, 463.

See CORPORATIONS, 1.

PREFERENCES.

See DEBTOR AND CREDITOR, 1, 2.

PRESCRIPTION.

See ADVERSE POSSESSION; HIGHWAYS, 6.

PRINCIPAL AND AGENT.

See AGENCY.

PROCESS.

1. OMISSION TO INSERT PROPER DIRECTION IN WRIT IS NOT FATAL, if it is served by the proper officer. The writ may be amended on motion, and the objection will thus be obviated. *Parker v. Barker*, 130.

2. **ON MOTION TO AMEND WRIT, IT MUST BE SHOWN**, either upon the facts or face of the writ and return, that the amended form would be proper. *Id.*

PUBLIC LANDS.

1. **UNITED STATES HAS BUT PROPRIETARY INTEREST** in land within the borders of the state, the sovereignty being in the state, and the rights attaching to such interest do not differ from those of any other land-holder in the state, except as provided by the constitution of the United States, and the terms of the compact between the general and state governments at the time the state is admitted into the Union. The state therefore cannot interfere with the primary disposal of the soil, nor with any regulations congress may find necessary for securing title to *bona fide* purchasers, nor can it tax the lands of the United States within its borders; and with those exceptions, such lands are subject to the same control by the state government as any other lands over which its jurisdiction extends. *State v. Bachelder*, 410.
2. **WHILE LANDS BELONG TO UNITED STATES** they may be disposed of by that government to whom it pleases, and the title may be secured to the purchaser in such manner as it sees fit to prescribe; but the moment the sale is completed and the title secured to the purchaser, the land enters into the general mass of the property of the state, relieved from all control of the federal government whatever, save such as is incident to the general relation of the state to the federal Union. *Id.*
3. **FRAUD OR OTHER IRREGULARITY MUST APPEAR ON FACE** of letters patent for land, to render them void in a court of law. When the fraud or other defect arises on circumstances *dehors* the patent, it is voidable only in a suit in equity. *Id.*
4. **ACTION TO SET ASIDE PATENT TO LAND** on the ground of fraud, by a party in actual possession, and brought under the Minnesota statute for determining an adverse claim, estate, or interest in land, is as much a direct proceeding to set aside the patent, as would be a bill in equity filed for that purpose. *Id.*
5. **STATE LAND-OFFICERS ACT JUDICIALLY**, and their decisions are as final as those of other courts, in all matters which by law are confided to their examination and decision. *Id.*
6. **PATENT, ISSUING IN VIRTUE OF DECISION OF LAND-OFFICERS**, may be impeached in equity for fraud or collusion in obtaining it, even where such officers act clearly within the sphere of their jurisdiction. But even in equity, it must be made to appear that the party had no remedy at law adequate to his protection. Nor will the court set aside the decision upon the suggestion of fraud alone. *Id.*
7. **AN ACTION TO SET ASIDE LAND PATENT** obtained through fraud, if it appear that plaintiff had notice and contested, or had an opportunity to contest and did not take advantage of it, the admission of false testimony would not be sufficient ground for relief. *Id.*

PUBLIC POLICY.

See **CONTRACTS**, 2-5; **EQUITY**, 1; **INSURANCE**, 1.

QUESTIONS OF LAW AND FACT.

See **CRIMINAL LAW**, 4; **NEGLIGENCE**, 3; **SALES**, 5, 6.

RAILROADS.

1. **WHETHER REGULATIONS MADE BY RAILROAD COMPANY ARE REASONABLE** is a question of fact to be determined by the jury, though their determination, when against the evidence, may be set aside by the court and a new trial granted. *Morris and Essex R. R. Co. v. Ayers*, 215.
 2. **REGULATION BY RAILROAD COMPANY IS REASONABLE AND VALID** when it provides that a receipt shall be given for all the goods before any part are removed. *Id.*
 3. **RAILROAD COMPANY IS NOT BOUND TO MAKE MORE THAN ONE DELIVERY** of any shipment of goods transported by it. The owner has no right to require the company to deliver portions of the goods at different times; but may be required to receive and receipt for the whole at once, having first been afforded an opportunity of seeing the goods and determining whether they were all there and in good condition. *Id.*
 4. **RAILROAD COMPANY CANNOT APPROPRIATE GROUND FOR ENGINE AND WATER STATIONS** after the lapse of five years, where it is authorized by its charter to appropriate a strip of land of but a certain width, except in deep cuts and fillings, or at points selected for depots, or engine or water stations, and is given five years to complete a locomotive road, but only a horse road was constructed within that time. *Plymouth R. R. Co. v. Colwell*, 528.
- See** ARBITRATION AND AWARD, 1; BAILMENTS, 2; COMMON CARRIERS, 2; EMINENT DOMAIN, 1-3; EXECUTIONS; HIGHWAYS, 3, 4; MASTER AND SERVANT, 2, 3, 4; SUBSCRIPTION, 1-3.

RAPE.

See CRIMINAL LAW, 13-16.

REALTY.

See CORPORATIONS, 1, 2; DEEDS; MORTGAGES.

RECORDS.

See COURTS.

REFEREES.

1. **REFEREE IS NOT BOUND BY PARTICULAR DECLARATION AND PLEADINGS**, but may award upon the subject-matter of the action without regard to them, when parties agree to a reference of a pending action, under a rule of court, so that the court is to render a judgment on the report; even where it is a part of the submission or rules of reference that the referee is to be governed by the rules of the law. *Cook v. Carpenter*, 670.
2. **POWER OF REFEREE, UNDER RULE OF COURT, EXTENDS TO WHAT PARTIES AGREED TO SUBMIT**, and no more; and if he undertakes to try and award upon other matters not submitted, the award is invalid. *Id.*

REGISTRATION.

1. **EQUITABLE DOCTRINE THAT PARTY MAY HAVE RELIEF** from his acts when done in ignorance of facts has no application to a question of priority of mortgage liens, arising from want of notice, and which must be decided by registry acts alone, at least when the rights of third parties would be affected. Such doctrine obtains in cases of sales of property, where some

fact known to the vendor and unknown to the vendee, which he is under no obligation or duty to discover, and which would materially influence the sale, is suppressed. *Parret v. Shaubhat*, 424.

2. WHEN PARTY DESIRES TO PURCHASE OR TAKE INCUMBRANCE upon land, his guide to the title is the records of the county; and the record of a mortgage is notice of its contents only so far as the record discloses it. If the record contains any instrument which is not authorized to be recorded, either from the nature of the subject-matter or a defect in its execution, it is a mere nullity, and is not notice for any purpose. Therefore, where the statute requires that a mortgage be executed in the presence of two witnesses, and the record discloses that only one was present at its execution, the registry is no notice to any one, and a mortgage subsequently executed and recorded, properly witnessed, is entitled to priority. *Id.*

REPLEVIN.

1. TO MAINTAIN ACTION OF REPLEVIN, WRONGFUL TAKING must be shown; a wrongful detention is not sufficient. *Harwood v. Smethurst*, 207.
2. MEASURE OF DAMAGES IN ACTION ON REPLEVIN BOND IS AMOUNT OF JUDGMENT RECOVERED in the replevin suit, when a return of the property is waived and a judgment for its value obtained, in accordance with the statute; and the damages cannot be reduced by showing that the plaintiff in the action on the bond was but a part owner of the property. *Williams v. Vail*, 76.
3. EXECUTION IS NOT EXECUTION UPON JUDGMENT IN REPLEVIN, so that upon its return unsatisfied an action upon the replevin bond can be maintained, where, after judgment for the defendant in replevin for the value of the property, the execution is issued in form in *assumpsit*, and purporting to be issued in favor of a plaintiff. *Id.*

RESCISSION OF CONTRACTS.

See CONTRACTS, 11; EQUITY, 1, 3; SALES, 17.

RESPONDENTIA SUPERIOR.

See AGENCY, 3-6.

SALES.

1. "SALE" MEANS CONTRACT BETWEEN PARTIES TO PASS RIGHTS OF PROPERTY FOR MONEY which the buyer pays, or promises to pay, to the seller for the thing bought and sold. *Huthmacher v. Harris's Adm'rs*, 502.
2. PURCHASE AT ADMINISTRATOR'S SALE OF "DRILL MACHINE," WHICH, UNKNOWN TO PARTIES, CONTAINED MONEY and other valuables, secreted there by the decedent, passes to the buyer the right to the machine and every constituent part of it, but not to the valuables, which, upon discovery, are held by him as treasure-trove, for the personal representative of the deceased owner. *Id.*
3. VENDOR OF PERSONAL PROPERTY DOES NOT IMPLIEDLY WARRANT THAT ARTICLE SOLD IS OF SPECIES or kind contemplated by the parties, where the sale is on inspection, and the vendee's knowledge is equal to that of the vendor. *Lord v. Grow*, 504.
4. VENDEE IS NOT BOUND TO PAY FOR ARTICLE, VALUELESS AS PURCHASED, and for the purpose for which it was purchased; and it is no answer for

- the vendor to say, in an action by him upon a note given for the price, that the vendee has something which can be made useful in some different manner, or for some other purpose. *Cragh v. Fowler*, 680.
6. SALE WITHOUT RESERVATION, FOR FULL PRICE, FOR PURPOSE OF PAYING CERTAIN DEBTS of the vendor, and with that intent, is a lawful and honest transaction. And a jury is not at liberty to deduce fraud from that which the law pronounces honest. *York County Bank v. Carter*, 494.
 6. SALE OF CHATTEL, ATTENDED WITH DELIVERY AND TRANSFER OF POSSESSION, which was retained for several weeks, is not a fraudulent transaction in law, and if the sale was collusive, it is for the jury to determine it as a fraud in fact. *Graham v. McCreary*, 591.
 7. BONA FIDE PURCHASER OF CHATTEL, FOR VALUABLE CONSIDERATION, WITHOUT NOTICE, FROM FRAUDULENT VENDER, takes a title clear of the fraud, whether it be actual or legal. *Sinclair v. Healy*, 589.
 8. FRAUDULENT REPRESENTATION IN SALE OF ARTICLE CONSISTS in some recommendation of it, or statement in regard to its good qualities, which is known to be untrue. *Page v. Parker*, 172.
 9. FRAUDULENT CONCEALMENT IS INTENTIONALLY OMITTING TO DISCLOSE SOME BAD QUALITY, or some fact relating to the property, known to the vendor and unknown to the purchaser, which it is material that the latter should know to prevent being defrauded. *Id.*
 10. IN ACTION FOR FRAUDULENT REPRESENTATION, it is essential that plaintiff credited the representation, acted upon it, and was in consequence damaged. *Id.*
 11. ACTION FOR FALSE REPRESENTATION WILL NOT LIE for vendor's misrepresenting the value of the thing sold, nor where the purchaser might, by the exercise of common prudence, have ascertained the truth, and saved himself from injury. *Id.*
 12. FALSE REPRESENTATIONS, TO BE GROUND FOR ACTION, MUST BE MATERIAL, and fraudulently, knowingly, and intentionally made; and must be accompanied by some deceit practiced for the purpose of putting the vendee off his guard. *Id.*
 13. MEASURE OF DAMAGES FOR FALSE REPRESENTATION is the difference between the value of the property as it actually was, and its value as it would have been if it were such as it was represented to be in those particulars in relation to which the false and fraudulent representations were made. *Id.*
 14. PRICE PAID FOR PROPERTY PURCHASED UNDER FALSE REPRESENTATIONS is strong but not conclusive evidence of the value of the property as it was represented to be. *Id.*
 15. RULE OF DAMAGES IN CASES OF WARRANTY DIFFERS FROM RULE IN CASES OF DECEIT AND FRAUD in this: that in warranty the vendor is answerable for all defects covered by the warranty, whether he knew of them or not; while in deceit he is only answerable for the particular defects concerning which he knowingly misled the purchaser to his injury. The rule will be the same only when the warranty covers precisely the same ground as do the false, fraudulent, and material representations. *Id.*
 16. PROPERTY OBTAINED ON CREDIT, WITH PRECONCEIVED DESIGN ON PART OF PURCHASER to cheat and defraud vendor out the same, may, upon discovery of the fraud by the vendor, be retaken, and the contract avoided, unless the property has passed to the possession of a bona fide holder for value. *Nichols v. Michael*, 259.

17. **VENDOR, TO WHOM VENDEE HAS GIVEN HIS NEGOTIABLE PROMISSORY NOTE** for goods, is not bound to tender such note at the time of rescinding the contract; it is sufficient if he produce it upon the trial, and deliver it into the custody of the court. *Id.*
18. **FRAUDULENT REPRESENTATIONS, TO AVOID SALE**, need not be such as would sustain an indictment for obtaining goods under false pretences. *Id.*
19. **FRAUDULENT VENDEE OF GOODS AND HIS ASSIGNEE THEREOF** for benefit of creditors are liable to a joint action by the vendor to recover possession. *Id.*
20. **AS GENERAL RULE, DECLARATIONS OF VENDOR MADE AFTER HE HAS PARTED WITH HIS TITLE** are not admissible in evidence to affect the title of the vendee; but where the vendor of the goods remains in the actual possession of them, his statements explanatory of such possession, and of the relation which he then holds to the property, are admissible for the purpose of showing fraud in the sale, if they have that tendency. *Grant v. Lewis*, 785.
21. **RETENTION OF POSSESSION OF GOODS BY VENDOR IS PRESUMPTIVE EVIDENCE** of fraud, and the burden of rebutting this presumption, and of showing by satisfactory evidence that there was really no intent to defraud, is cast upon the purchaser. *Id.*
22. **WHERE VENDOR OF GOODS MAKES ARRANGEMENT WITH VENDEE** by which the former shall have the privilege of reclaiming them upon payment of the amount of a claim which the vendee holds against him, such arrangement will create a trust for the benefit of the vendor, and render the sale void as to creditors, if the value of the goods exceeds the amount of such claim. But if the value of the goods did not exceed the amount of the vendee's claim, it is doubtful whether the reservation of the right to buy them back at their full value would constitute such a benefit to the vendor as to avoid the sale. *Id.*
23. **WHERE VENDOR OF GOODS RETAINS POSSESSION THEREOF NOMINALLY AS AGENT OF VENDEE**, but with the right to sell and have all he can make beyond the actual cost, that is such an interest reserved as is utterly inconsistent with good faith in the sale, as against his creditors. *Id.*

See WITNESSES, 2.

SELF-DEFENSE.

See CRIMINAL LAW, 1-5.

SET-OFF.

WHERE CONTRACT IS BASIS OF TRANSACTION, and a breach of it may amount to a trespass, or entitle the injured party to an action for negligence, fraud, or otherwise, in form *ex delicto*, such party is not deprived of his right to plead a counter-claim as set-off against the action. The wrongdoer is not allowed to deprive the injured party of the advantage of the contract by having tortiously violated it. *Folsom v. Carr*, 456.

See USE AND OCCUPATION, 2.

SEWERS.

See CORPORATIONS, 7, 8.

SHERIFFS.

1. **COUNT IN CASE IN ACTION AGAINST SHERIFF**, alleging misfeasance by which plaintiff lost his debt, is properly joined with count in trover and conversion against him individually, for goods belonging to plaintiff, and detained by the defendant. *Patterson v. Anderson*, 579.
2. **SHERIFF LEVYING UPON GOODS AS PROPERTY OF A, IN WHICH B CLAIMS PARTNERSHIP INTEREST**, may, on refusal of plaintiff upon request made, to indemnify him, either return the writ *nulla bona*, or refuse to sell anything but the interest of the defendant in the goods. *Id.*
3. **SHERIFF IS ANSWERABLE TO PLAINTIFF IN EXECUTION, AS FOR CONVERSION OF GOODS SOLD**, where, after sale, he retains possession until payment of bid, and then refuses delivery to purchaser, who was plaintiff in execution, and who offered indemnity; but on the other hand, delivered possession to person claiming to be the partner against whom the purchaser afterwards established his title to the goods. *Id.*
4. **THOUGH SHERIFF AND HIS DEPUTIES ARE REGARDED AS ONE OFFICER**, for many purposes, this rule cannot be extended so far as to make the sheriff chargeable with notice of all that has come to the knowledge of any of his deputies. Where, therefore, an execution is delivered to a deputy sheriff, who returns it unsatisfied because he could find no property upon which to levy, and the sheriff, without notice of the senior execution in the hands of his deputy, levies a junior execution upon the property of the same defendant, he will not be liable to the senior execution creditor for having first satisfied the junior execution. *Russell v. Lawton*, 769.

See ATTACHMENTS, 4, 5; EXECUTIONS; JUDICIAL SALES, 1, 2, 4, 5.

SLANDER.

1. **WORDS SPOKEN IN JUDICIAL PROCEEDING, THOUGH ACTIONABLE PER SE, ARE PRIMA FACIE PRIVILEGED**, and to sustain an action for slander in speaking such words, the complaining party must show that they were not pertinent or material, and that the speaker was animated by ill-will and hatred. *Calkins v. Sumner*, 738.
2. **ACTION FOR SLANDER WILL NOT LIE AGAINST WITNESS, IF WHAT HE SAID WAS PERTINENT** and material to the issue, no matter how much he may be actuated by hatred or ill-will. *Id.*
3. **WITNESS IS NOT ANSWERABLE IN DAMAGES** for any statements he may make responsive to questions put to him, and which are not objected to and ruled out by the court; or concerning the impertinency or impropriety of which he receives no advice from the court or tribunal before which the proceeding is had. *Id.*
4. **EVIDENCE THAT SIMILAR REPORTS WERE PREVIOUSLY IN CIRCULATION CONCERNING PLAINTIFF ARE ADMISSIBLE** in mitigation of damages in an action for slander. *Farr v. Rasco*, 88.

STATUTE OF LIMITATIONS.

See ADVERSE POSSESSION; BANKS AND BANKING, 4, 5; SURETYSHIP, 4; TROVER, 4.

STREETS.

See CORPORATIONS, 7, 8; HIGHWAYS.

SUBSCRIPTIONS.

1. **CONDITION IN CONTRACT OF SUBSCRIPTION TO STOCK OF RAILROAD COMPANY**, that road should be located and constructed along designated route, is not condition precedent, requiring the actual construction and completion of the road before payment could be required, but only means that when the road was located and constructed, it should occupy the route designated. *Miller v. Pittsburgh etc. R. R. Co.*, 570.
2. **GUARANTY THAT COMPANY WILL PAY INTEREST ON STOCK "AS SOON AS PAID"** constitutes no defense to action against stockholder on his contract of subscription, although the company has suspended operations. *Id.*
3. **RESERVATION IN BONDS ISSUED BY TOWNSHIP FOR RAILROAD STOCK**, that township may require company to take the stock subscribed, and redeem bonds, cannot be enforced against those to whom the company may assign the bonds. *Goshen Township v. Shoemaker*, 386.
4. **PAROL EVIDENCE IS ADMISSIBLE TO SHOW** that a subscription, expressed in terms to be "for the purpose of building a Catholic chapel," was intended "for the purpose of building a Roman Catholic chapel," to be used as a place of public worship, according to the rights and ceremonies of the Roman Catholic church. *O'Heur v. De Goezbriand*, 653.
5. **QUESTION IS ONE OF FACT**, whether the rules of the canon law of the Roman Catholic church, relative to the property in pews, were adopted or recognized by the signers to a subscription for the building of a Catholic chapel. *Id.*

See CONTRACTS, 11.

SURETYSHIP.

1. **SURETY IS NOT RELEASED BY ANY ACT or conduct of the payee** which does not place surety in worse position than he would otherwise have been. *Driskell v. Mateer*, 105.
2. **SURETY IS NOT RELEASED BY CREDITORS DECLARING TO HIM THAT DEBT IS PAID**, if such surety does not in consequence change his situation or otherwise suffer loss. *Id.*
3. **SURETY ON OFFICIAL BOND OF COMMITTEE OF LUNATIC MAY MAINTAIN ASSUMPSIT FOR MONEY HAD AND RECEIVED** against one by whom it is collected under an agreement between the three parties, that the defendant was to collect the money due the lunatic, and retain it subject to the order of the surety until he should be released from his suretyship, although the action is begun before judgment in a suit against the surety on his bond is obtained. *Keller v. Rhoads*, 539.
4. **STATUTE OF LIMITATIONS DOES NOT BEGIN TO RUN AGAINST SURETY ON COMMITTEE'S BOND** in favor of one who is to collect money for the committee and retain it in his custody until the surety is discharged from his liability or damnified, from the time the money is so collected by him, but from the time the liability of the surety is fixed by the settlement of the committee's account. *Id.*

See BAILMENTS, 6; OFFICE AND OFFICERS, 4-6.

SURGEONS.

See PHYSICIANS.

TAXATION.

See CORPORATIONS, 2.

TENDER.

See ACCORD AND SATISFACTION, 2.

TOWNS.

See BONDS.

TRADE-MARKS.

1. INJUNCTION WILL NOT BE GRANTED TO RESTRAIN USE OF TRADE-MARK, which consists in part of the name of a former partner of some of the defendants, and which was adopted and used by the partnership, without objection, in the life-time of such partner, and used by the defendants since his death. The right to the use of such trade-mark is secured to the defendants by the Massachusetts statutes. *Bowman v. Floyd*, 55.
2. INJUNCTION WILL BE GRANTED, WITHOUT REGARD TO LAPSE OF TIME, TO RESTRAIN CONTINUED USE OF ANOTHER'S NAME, in the designation, in whole or in part, of an existing partnership, without having obtained the written consent of the person if he be living, or of his legal representatives if he be dead, as required by the Massachusetts general statutes, chapter 56, sections 1-4. *Id.*
3. RECEIPT WILL NOT BE CONSTRUED AS WRITTEN CONSENT TO CONTINUED USE OF ANOTHER'S NAME, when it is given merely in settlement of the claims of executors of a deceased partner against surviving partners, but in which the latter are mentioned by the partnership name, under which they continued to carry on business. *Id.*

TREASURE-TROVE.

See SALES, 2.

TRESPASS.

1. EXEMPLARY DAMAGES MAY BE RECOVERED IN TRESPASS QUARE CLAUSUM FREIGHT, if the facts would warrant such a recovery in any other form of action. *Perkins v. Towle*, 149.
2. MALICE—UNDER GENERAL ISSUE IN TRESPASS, everything directly connected with the acts complained of may be proved to show or to rebut malice. *Id.*
3. IN TRESPASS, MATTERS NOT DIRECTLY CONNECTED WITH ACTS COMPLAINED OF CANNOT BE SHOWN. Thus in trespass for tearing down plaintiff's house, it is inadmissible to show, for the purpose of rebutting the presumption of malice, that the house was occupied by lewd women; that visitors entered over defendant's land, left the bars down, and disturbed a religious meeting, etc. *Id.*

See CO-TENANCY, 1, 3; FENCES; MINES AND MINING, 1; SET-OFF; USE AND OCCUPATION.

TROVER.

1. TROVER WILL LIE FOR WRONGFUL CONVERSION OF PROMISSORY NOTE. *Per Thompson, J. Davis v. Fink*, 519.
2. TROVER LIES TO RECOVER PROPERTY APPROPRIATED BY THEFT, as well as that taken by fraudulent means or by trespass. *Hutchinson v. M. & M. Bank*, 596.

3. PRIVATE ACTION OF TROVER IS SUSPENDED until the public prosecution for the offense has been duly conducted and ended, but the private wrong is not merged in the public wrong, nor does the public prosecution supersede the private action. *Id.*
 4. IF ACTION OF TROVER IS COMMENCED WITHIN PERIOD OF LIMITATION, after the conclusion of the public prosecution for a theft, it will not be barred by the statute; the action being suspended until that time, the statute of limitation cannot begin to run against the action until the disability is removed. *Id.*
- See AGENCY, 7; ATTORNEY AND CLIENT, 2; EXECUTORS AND ADMINISTRATORS, 4; MINES AND MINING, 1; SHERIFFS, 1.

TRUSTS.

1. DOCTRINE OF RESULTING TRUSTS "has its origin in the natural presumption, in the absence of all rebutting circumstances, that he who supplies the money means the purchase to be for his own benefit, rather than that of another; and that the conveyance in the name of the latter is a matter of convenience, or arrangement between the parties for other collateral purposes;" but this reason fails to apply to a purchase in the name of a wife or child, because there is *prima facie* a presumption of benefit intended for such. *Dickinson v. Davis*, 202.
2. PRESUMPTION OF TRUST ARISES IN FAVOR OF ONE WHO PAYS PURCHASE-MONEY OF LAND, when it is conveyed to a stranger, but such a presumption is rebutted in case the purchase can fairly be deemed to have been made for another, from motives of natural love and affection. Thus a purchase by a parent in the name of a child is deemed *prima facie* an advancement from which no trust results; and the presumption that such a purchase is intended for a provision is stronger in the case of a wife than of a child. *Id.*

See CHARITIES; HUSBAND AND WIFE, 6-9; PARTNERSHIP, 11.

UNDUE INFLUENCE.

See WILLS, 1.

UNINCORPORATED SOCIETIES.

UNINCORPORATED ASSOCIATION IS INCAPABLE, AS SUCH, TO TAKE GIFT of real or personal property under a will for charitable purposes, where no trustees of the charity are directed or designated in the will. *Downing v. Marshall*, 290.

USE AND OCCUPATION.

1. ASSUMPT FOR USE AND OCCUPATION cannot be supported, where the possession is adverse, and the relation of landlord and tenant has never existed between the parties; but plaintiff must declare in ejectment or trespass. *Folsom v. Carl*, 456.
2. IN ACTION ON NOTE, COUNTER-CLAIM for use and occupation cannot be the subject of set-off, where the possession is adverse, and the relation of landlord and tenant has never subsisted between the parties. This under the Minnesota statute. *Id.*

See CO-TENANCY, 2, 3.

VENDOR AND VENDEE.

1. ONE WHO HAS MADE CONTRACT FOR PURCHASE OF REAL ESTATE, AND PAID PART of the purchase-money, has an equitable lien on the land for the amount paid, where the completion of the contract is prevented by the default or wrongful act of the vendor. The vendee in such a case is entitled to a judgment for the sale of the land to make the amount due to him, his lien being in the nature of a mortgage. And where the contract is recorded, the lien will be enforced against the land in the hands of a subsequent purchaser. *Wickman v. Robinson*, 789.
2. WHERE LAND AGREED TO BE CONVEYED IS TO BE PAID FOR IN SERVICES, and the vendor refuses to perform his agreement after the vendee has performed part of his contract, the amount for which the latter will have a lien thereon is the value of the services actually performed, estimated according to the contract price. *Id.*
3. WHERE VENDOR EXECUTES AND DELIVERS DEED, AND IMMEDIATELY RECEIVES MORTGAGE BACK as security for the price, the acts are but parts of the same transaction, contemporaneous and connected, and afford no opportunity for the liens of judgment or other creditors of the grantee to attach to the legal estate before that of the grantor for the unpaid purchase price. *Rees v. Ludington*, 741.
4. WHERE, AFTER BUILDING IS ERECTED, VENDOR OF LAND EXECUTES DEED FOR IT TO VENDEE, AND IMMEDIATELY TAKES MORTGAGE back upon the premises to secure the unpaid purchase-money, the mortgage is only a continuance of the vendor's lien in another form, and is superior to the liens of the mechanic and the material-man. *Id.*
5. EQUITY WILL NOT GRANT RELIEF where a merely false assertion of value is made by a vendor to a vendee, where no warranty is made or intended. There is no confidential relations between buyer and seller. *Rockafellow v. Baker*, 624.
6. CONCEALMENT OR SUPPRESSION BY VENDOR OF MATERIAL FACTS, which he is bound to communicate to his vendee, is a fraud; but a failure to communicate facts which are accessible to both is not. *Id.*
7. EQUITY WILL NOT LEND ITS AID TO ENFORCE FORFEITURE by granting an injunction to prevent a vendee from removing a house erected by him upon the land, where the vendor declared the contract forfeited, according to its terms, for the non-payment of an installment of the purchase-money. *Crane v. Dwyer*, 87.
8. DECLARATIONS OF VENDOR WHILE POSSESSION OF PROPERTY TRANSFERRED WAS BEING DELIVERED are admissible in evidence as part of the *res gesta*. *York County Bank v. Carter*, 494.
9. EVIDENCE THAT VENDEE ASSUMED TO PAY DEBTS OF VENDOR IS ADMISSIBLE to rebut an allegation of fraud in the sale; and so also is evidence that before the date of the sale the vendee had borrowed money to loan it to the vendors. *Id.*

VERDICT.

See PLEADING AND PRACTICE, 10, 12.

VOLUNTARY PAYMENTS.

MONEY VOLUNTARILY PAID FOR LOSSES IN STOCK-JOBBERING TRANSACTIONS, in violation of statute, cannot be recovered back. *Wyman v. Flats*, 66.

WAREHOUSEMAN.

See **ATTORNEY AND CLIENT**, 1-5; **COMMON CARRIERS**, 2.

WARRANTY.

See **SALES**, 3-15; **VENDOR AND VENDEE**, 8.

WASTE.

See **EXECUTORS AND ADMINISTRATORS**, 2.

WAYS.

See **ADVERSE POSSESSION**, 7.

WILLS.

1. **INFLUENCE GENERATED BY LAWFUL RELATIONS**, such as legitimate family and social relations, is not such an influence upon a testator as will invalidate his testamentary disposition of his property, unless it is exerted over the very act of devising so as to prevent the will from being truly the act of the testator. If this influence arises from unlawful relations, and should be exercised, it would be an unlawful influence; if a will is made under such influence, it is proper to submit the question to the jury to determine whether or not it had unduly affected the mind of the testator while making his will. *Dean v. Negley*, 620.
2. **WILL IS NOT ANY LESS SUBJECT TO REVOCATION BY OPERATION OF LAW** because it is made by a woman under the special power contained in a marriage settlement, instead of under the general power granted by law. *Young's Appeal*, 513.
3. **WILL IS REVOKED BY IMPLICATION**, if the circumstances of the testator be so altered that new moral testamentary duties have accrued to him subsequent to the date of the will, such as may be presumed to produce a change of intention. *Id.*
4. **WILL OF MARRIED WOMAN IS REVOKED BY SUBSEQUENT BIRTH OF CHILD**, but only so far, under the statutes of Pennsylvania, as the child would have taken without the will. *Id.*
5. **FACT THAT DRAUGHTSMAN OF WILL TAKES LEGACY UNDER IT** is at most only a suspicious circumstance which may be of more or less or no weight, according to its connection with other circumstances indicative of fraud or undue influence. *Coffin v. Coffin*, 235.
6. **SECRECY IN EXECUTION OF HIS WILL, CONTRIVED BY TESTATOR HIMSELF**, is not to be regarded as in any wise impeaching its validity. *Id.*
7. **PREFERENCE OF COLLATERAL RELATIVES OVER WIFE IN WILL**, does not necessarily show undue influence or fraud, nor does it, in the absence of further proof, impeach the validity of the will. *Id.*
8. **PUBLICATION OF WILL MAY BE MADE IN ANY FORM** of communication by testator to witnesses, whereby he makes known to them that he intends the instrument to take effect as his will. *Id.*
9. **TESTATOR'S REQUEST TO WITNESSES TO SUBSCRIBE ATTESTATION** may be made through any words or acts which clearly evince that desire to them, and the publication may be incorporated with the request. *Id.*
10. **WHERE ONE OF TWO WITNESSES TO WILL**, in the presence and hearing of the other, asked the testator, "Do you request me to sign this paper as your will, as a witness?" and the testator answered, "Yes," this was

sufficient as a request to both the witnesses, and as a publication of the will. *Id.*

11. UNDER DEVISE AND BEQUEST TO TESTATOR'S SON of real and personal property for life, and to his heirs in case he die leaving issue, or if he die without issue to the testator's nephews and neices, if the son should die without issue before the testator, there would be no lapse, but the contingent limitation would take effect in favor of the nephews and nieces. *Downing v. Marshall*, 290.
12. BEQUEST IN TRUST TO APPLY INCOME TO SON'S SUPPORT DURING LIFE, the principal to be paid to his issue, passes to other devisees and legatees, under a contingent limitation in their favor of all real and personal estate devised and bequeathed to the son, the testator having elsewhere in the will referred to this fund as a part of the son's estate, though he had only a beneficial interest therein for life. *Id.*
13. UNDER DEVISE OF LAND, ONE THIRD TO CHILDREN OF TESTATOR'S BROTHER A, in equal shares, and one third to the children of his brother B, the children of each class take the share belonging to their class as tenants in common. *Id.*
14. UNDER DEVISE TO CLASS OF PERSONS, where, by reason of legal incapacity of the others, but one person of the class can take, he takes all the estate which the devise, by its terms, gives to the whole class. *Id.*
15. UNDER DEVISE TO CLASS OF PERSONS, where, by reason of alienage, none can take, the estate descends to the heirs of the testator, and not to the residuary of the devisees. *Id.*
16. DEVISE IN TRUST TO RECEIVE AND APPLY RENTS AND PROFITS of real estate during the lives of two persons in being, and then to sell the property and dispose of the proceeds and income to certain corporations and unincorporated societies, for benevolent and religious purposes, will fail, as such, if the lives on which the trust is made to depend were those of persons having no interest in its performance, or who were not beneficiaries thereunder, though the trusts attempted to be created are valid as powers in trust, so far as the beneficiaries are competent to take by devise. *Id.*
17. BEQUEST OF SUM OF MONEY TO BE INVESTED IN LAND, of which the rents and profits are to be applied to the use of certain beneficiaries during fifteen years, and the land then to be sold, and the proceeds divided amongst the same persons, is void, because it contemplates a trust which would unlawfully suspend the power of alienation. *Beekman v. Bonsor*, 269.
18. BEQUEST LEAVING SUM NOT EXCEEDING CERTAIN LIMIT in the discretion of executors who have renounced wholly fails, because the amount is ascertained; and the gift cannot be sustained as a pecuniary legacy by disregarding directions (void because they unlawfully suspend the power of alienation) to convert such money into land, apply the proceeds for fifteen years to the benefit of certain persons, and then reconvert it into money, and divide it among the same persons. *Id.*
19. BEQUEST OF MONEY TO BE LAID OUT IN LANDS FOR BENEFIT OF ALIENS, who are to have the possession and enjoyment, is in contravention of the New York statute concerning wills, and is therefore void. *Id.*
20. IF, UNDER DISPOSITION OF RESIDUUM OF PERSONAL ESTATE by will in two parts, the first disposition be invalid, the sum which it was the purpose thereby to dispose of does not go to the legatee of the other part, but to the next of kin of decedent. *Id.*

21. WHERE, UNDER WILL, SUM OF MONEY IS DISPOSED OF in two parts, one of which is to be applied to a certain purpose before the remainder as the second part, is disposed of, and the sum devoted to the prior purpose cannot be ascertained by reason of the failure of that purpose or otherwise, the gift of the remainder is void for uncertainty in the amount. *Id.*
 22. TESTATOR MAY, BY PROPER WORDS OF LIMITATION, RESTRICT ENJOYMENT OF BEQUEST to the period during which his legatee shall remain unmarried. *Holtz's Estate*, 490.
 23. BEQUEST OF INTEREST OF CERTAIN FUND, TO BE PAID TO LEGATEE during all the term that she shall continue the widow of the testator's son, with a disposition of the fund to others at the termination of the bequest by her marriage, is not a bequest *in terrorem*, and is valid. *Id.*
 24. LEGACY CHARGED ON LAND IS IN NATURE OF ORDINARY DEBT which the owner of the land has promised to pay, and no demand is necessary. *Wiggin v. Wiggin*, 192.
 25. ASSUMPSIT FOR LEGACY WILL LIE AGAINST OWNER OF LAND upon which the legacy is a charge. *Id.*
 26. DEVISE OF CERTAIN ROOMS FOR LIFE, AND OF CERTAIN QUANTITY OF WOOD for fuel, entitles the legatee to sell the wood or to remove and burn it elsewhere. *Id.*
- See CHARITIES; CORPORATIONS, 1; EXECUTORS AND ADMINISTRATORS; PARTNERSHIP, 19; UNINCORPORATED SOCIETIES.

WITNESSES.

1. EVIDENCE SOUGHT TO LAY FOUNDATION TO IMPRACH WITNESS MUST BE RELEVANT TO ISSUE. *Goodall v. State*, 396.
 2. VENDOR OF PERSONAL PROPERTY, THROUGH WHOM BOTH PARTIES CLAIM TITLE THERETO, is competent witness for plaintiff in an action against the sheriff for seizing and selling the property under an execution against the vendor. *Graham v. McCreary*, 591.
 3. IN ACTION BETWEEN HUSBAND AND WIFE, EITHER PARTY IS COMPETENT WITNESS against the other, in general, under the New York law of 1857, though inadmissible to prove the particular fact of non-intercourse. *Chamberlain v. People*, 255.
 4. ON INDICTMENT OF HUSBAND FOR PERJURY, AFTER DIVORCE, WIFE IS COMPETENT WITNESS to prove that she has had no sexual intercourse with any other person. *Id.*
- See AGENCY, 8; CRIMINAL LAW, 12, 16; COLLATERAL SECURITIES; EVIDENCE, 7; NEGOTIABLE INSTRUMENTS, 3, 21; SHERIFFS, 2, 3; WILLS, 8, 10.

WRITS.

See CERTIORARI.

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